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

DEFENDANTS-APPELLEES INDIVIDUAL ALLOTTEES' RESPONSE BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(C)(1) of the Rules of Court for the United States Court of Appeals for the Tenth Circuit, counsel for Defendants-Appellees Individual Allottees hereby notifies the Court that no other appeal in or from the same civil action in the lower court was previously before this or any other appellate court under the same or a similar title. Additionally, no cases are known to counsel to be pending in this or any other court that will directly affect this Court's decision in the pending appeal.

Dated: September 30, 2016 */s/ Michael M. Mulder*

Michael M. Mulder
The Law Offices of Michael M. Mulder

CERTIFICATE OF SEPARATELY FILED BRIEF

Pursuant to 10th Cir. Rule 31.3(b), I hereby certify that the foregoing Defendants-Appellees Individual Allottees' Response Brief is being filed separately from the briefs of other named appellees in order to address arguments related to 25 U.S.C. § 357, not addressed in other named appellees' briefs. Furthermore, Defendant-Appellee United States did not reveal its position on the issues before briefing was due.

Dated: September 30, 2016 */s/ Michael M. Mulder*

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INTRODUCTION

Plaintiff-Appellant Public Service Company of New Mexico ("PNM") owns a 39-mile long high power line known as the AY line. The line crosses lands wholly owned by the Navajo Nation as well as parcels with undivided interests owned by individual Indians as tenants in common with the Navajo Nation. Owners of five of the allotments refused to consent to the right of way's renewal and PNM brought this condemnation action to condemn the rights of way. Defendant-Appellee Navajo Nation ("Navajo Nation" or "Nation") and individual Defendants-Appellees Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, Dorothy W. House, Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens (collectively referred to as "Individual Allottees") own interests in two of these parcels. These two parcels are the subjects of this appeal.[1]

The Individual Allottees will limit their response to Certified Question No. I and hereby adopt the arguments of the Navajo Nation as to Certified Questions Nos. II – IV.

[1] Although all twenty-two of the Individual Allottees were named in the notice of appeal, only eleven have an interest in either of the two allotments involved in the appeal. These persons, Lorraine J. Barboan, Laura H. Chaco, Benjamin A. House, Mary R. House, Annie H. Sorrell, Dorothy W. House, Leonard Willie, Irene Willie, Charley Johnson, Eloise J. Smith, and Shawn Stevens, are the proper party appellees.

SUPPLEMENTAL STATEMENT OF THE CASE

PNM's AY line passes over land owned by the Navajo Nation as well as land owned jointly by the Nation and the Individual Allottees. The line occupies a right of way over these lands granted by the Bureau of Indian Affairs (BIA) which expired in April 2010. Some time before that date, PNM filed an application with the BIA for a 20-year renewal of the right of way. As a condition for the application, PNM had to and did obtain consents from the Individual Allottees for renewal of the expired right of way. This was required by 25 U.S.C. Section 324 and 25 C.F.R. Section 169.107.[2] The required consents were obtained, and the BIA accepted and began to process the application filed in approximately November 2009.

Among the allottee landowners who had consented were the eleven (11) individuals involved in this appeal. As early as December 23, 2009, the Individual Allottees notified the BIA that they were revoking their consent. This revocation was reiterated through letters to the BIA and/or PNM on January 7, 2010, April 27, 2011, April 23, 2012, and June 10, 2014. Aplt. App. at 66, ¶ 30.

[2] The right-of-way regulations were amended in 2015. The new version became effective as of March 21, 2016. *See* 80 Fed. Reg. 72492 (Nov. 19, 2015); 80 Fed. Reg. 79258 (Dec. 21, 2015). The requirement of tribal consent, however, remains unchanged.

Under BIA regulations, the BIA cannot grant a right of way to a power company that cannot obtain the necessary consent. 25 C.F.R. Section 169.107 states:

> (a) For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right of-way across tribal land. . .
> (b) For a right-of-way across individually owned Indian land, the applicant must notify all individual Indian landowners and, except as provided in paragraph (b)(1) of this section, must obtain written consent from the owners of the majority interest in each tract affected by the grant of right-of-way.
> (1) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if all of the following conditions are met: . . .

In January 2015, the BIA informed PNM that it could not approve its pending application because it did not have the requisite consent, and that PNM would need to negotiate. Aplt. App. at 67 ¶ 35; 68-69 ¶ D. PNM, however, has at no time been willing to do so. Instead, on June 13, 2015, PNM brought the present action, seeking to perpetually condemn the land under its AY line on their allotments. Co-defendant Navajo Nation also owns an interest in the two allotments at issue. There is nothing in the record to indicate PNM attempted to negotiate with the Nation before naming it in this condemnation action.

SUMMARY OF ARGUMENT

The Individual Allottees limit their argument to Certified Question I: Does 25 U.S.C. Section 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?

After reviewing the principles of statutory construction in federal Indian law (part a), which favor a construction that supports tribal sovereignty, the Individual Allottees show that Section 357's focus is on individual Indians, not tribes, and does not expressly authorize condemnation of lands held in trust for the benefit of tribes (part b). They go on to explain that Congress has clearly intended for rights of way across tribally owned lands held in trust by the United States to be obtained only by consent (part c) under 25 U.S.C. Section 324, and that the federal courts have uniformly found that such lands are not subject to condemnation (part d). Individual Allottees then highlight (part e) that even if proceedings under Section 357 could be characterized as in rem, dismissal is still warranted under New Mexico substantive and federal procedural law. This brief concludes (part f) by addressing PNM and Transwestern's policy arguments, observing that Congress has studied the current system, which requires energy companies regularly and routinely negotiate with tribes for rights of way, and found that the long-standing policy of requiring tribal consent for the alienation of tribal holdings has had no demonstrable effect on energy prices, reliability, or supplies.

ARGUMENT

I. 25 U.S.C. Section 357 Does Not 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.

a. The Statutes and Regulations at Issue Must be Liberally Construed in Favor of Tribal Sovereignty.

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). As this Court has explained:

> Rules of statutory construction generally "provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Cohen* at 225. *See, e.g., Santa Clara Pueblo v. Martinez* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (construing Indian Civil Rights Act narrowly so as to avoid limiting tribal sovereignty); *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (upholding right of Indians to be free of state taxation in spite of provisions of Public Law 280)…. Where tribal sovereignty is at stake, the Supreme Court has cautioned that "we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60, 98 S.Ct. 1670. The Court's teachings also require us to consider tribal sovereignty as a "'backdrop,' against which vague or ambiguous federal enactments must always be measured," and to construe "[a]mbiguities in federal law ... generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache*, 448 U.S. 143–44, 100 S.Ct. 2578 (1980). Courts are consistently guided by the "purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 496 (7th Cir.1993). We

> therefore do not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so. (emphasis added)

N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1194-95 (10th Cir. 2002) (citations in original).

The rights of way statutes and regulations at issue therefore must be liberally construed in favor of tribal sovereignty, meaning that the long-standing policy of requiring tribal consent for rights of way across lands held for the benefit of the tribes is to be upheld absent clear congressional intent to the contrary.

b. 25 U.S.C. § 357 Does not Expressly Provide for Condemnation of Tribal Lands, Including Allotted Lands Acquired by Tribes.

Section 357 focuses on "Indians," not tribes:

> **Lands allotted in severalty to Indians may be condemned** for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

25 U.S.C. § 357 (emphasis added).

As the district court held, use of the language "'[l]ands allotted in severalty to Indians may be condemned' illustrates a singular Congressional focus on allotted land owned by individual tribal members." Aplt. App. at 137. "Under its plain language, § 357 only allows condemnation of allotted lands owned by individual tribal members, and § 357 does not expressly apply to allotted lands acquired by Indian tribes." Aplt. App. at 138.

Importantly, the term "Indian" was clearly understood during the allotment era to refer to individuals. As the district court noted,

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

Aplt. App. at 137, fn 17.

Not only is the statute limited to interests held exclusively by "Indians," it is limited to allotted lands held in "severalty," which, although not defined in the statute, is generally understood to mean: "The state or condition of being separate or distinct <the individual landowners held the land in severalty, not as joint tenants>." *Black's Law Dictionary* 1378 (7th ed. 1999).

25 U.S.C. Section 2213(a) provides that a tribe "receiving a fractional interest" is a "tenant in common with the other owners" of such lands. Thus, after the acquisition of the fractioned interest by the Navajo Nation, the Tribe now holds interests as a tenant in common with other "Indians." As such, Section 357 does not provide for condemnation of the subject lands since it is limited to "[l]ands allotted in severalty to Indians." As noted by the Eighth Circuit in *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County, Hiram Grant*, 719

F.2d 956, 962 (8th Cir. 1983) ("*NPPD*"), "[i]t is the fact of tribal ownership which establishes the existence of tribal land, not the identity of the grantor."

PNM and Transwestern's attempt to get around this language by characterizing an "allotment" as a one-time, permanent legal classification that remains within the reach of Section 357 without regard to subsequent events such as acquisition by a tribe is meritless. Allotment status was never designed to be permanent. The term "allotment" is a term of art in Indian law, generally used to describe parcels of land held in trust for the benefit of individual Indians. *Cohen's Handbook of Federal Indian Law*, 1039 (2005 ed.). Under the General Allotment Act and its implementing legislation, the interests were only to be held in trust for a period of twenty-five years. 25 U.S.C. § 489. A number of statutes provide for the issuance of fee patents in allotments (presumably PNM would concede that Section 357 would not apply to land held in fee).[3] Numerous other statutes and regulations allow for allotted lands to be sold, exchanged with other fee or trust lands, and conveyed.[4] And the Indian Land Consolidation Act (ILCA), P.L. 97-459, 96 State 2515, codified as amended in 25 U.S. C. §§2201-2221, allows tribes

[3] *See, e.g.,* 25 U.S. C. § 349 (allowing for early patent on finding of competency); 25 U.S.C. § 378 (partition of allotment among heirs and providing for fee patents); 25 U.S.C. § 404 (sale on petition of allottee or heir).

[4] *See, e.g.*, 25 U.S.C. § 350 (surrender of patent, and selection of other land); 25 CFR § 152.17.

to purchase part or all of the interests in allotments. 25 U.S.C § 2204(a)[5]. An "allotment" can therefore hardly be described a permanent legal classification. The legal status of the land changes based on how it is held and who actually owns it.

In summary, the argument here starts and ends with Section 357: it authorizes condemnation only of "[l]ands allotted in severalty to Indians." Since the Tribe here is a tenant in common with the Individual Allottees, it is land which is owned jointly by an entity not an "Indian" and so is not land subject to condemnation.

c. Rights of Way Over Tribally Owned Lands Are Not Subject to Condemnation.

25 U.S.C. Section 324 unequivocally requires tribal consent to obtain a right-of-way across tribally owned lands and draws a clear distinction between tribal and individually owned lands. Section 324 provides, in part:

> **No grant of a right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials**.

The Section then continues and addresses "lands of individual Indians":

> **Right-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant. . .**

[5] Notably, a finding that tribes are subject to condemnation by acquiring interests in allotments would obviously chill Congress's effort to consolidate lands.

The revised Federal Regulations applicable to rights-of-way across lands held in trust for tribes and individual Indians also delineate the procedures that apply to each. 25 C.F.R. Section 169.107 provides, in pertinent part:

> (a) For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe, if the tribe so requires, to a grant of right of-way across tribal land. . . .
> (b) For a right-of-way across individually owned Indian land, the applicant must notify all individual Indian landowners and, except as provided in paragraph (b)(1) of this section, must obtain written consent from the owners of the majority interest in each tract affected by the grant of right-of-way.
> (1) We may issue the grant of right-of-way without the consent of any of the individual Indian owners if all of the following conditions are met: . . . .

In turn, "Tribal land" is defined in 25 C.F.R. Section 169.2 (2015) as follows:

> Tribal land means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status. . . .

This does not change based on the size of a tribe's ownership interest, which was made clear during the comment period for the new right-of-way regulations:

> *Comment – "Tribal Land"*: A tribal commenter asked whether a tract is considered tribal land, even if fractional interests are owned by both the tribe and individual Indians. Another commenter suggested defining "tribal land" to only include land that is not individually owned. A commenter suggested limiting tribal land to those tracts in which the tribe holds a majority interest.
>
> *Response*: Under the proposed definition and the final definition, a tract is considered "tribal land" if any interest, fractional or whole, is owned by a tribe. A tract in which both a tribe and individual Indians own fractional interest is considered tribal land for the purposes of

> regulations applicable to tribal land. If the tribe owns any interest in a tract, it is considered "tribal land" and the tribe's consent for rights-of-way on the tract is required under 25 U.S.C. 323 and 324.

80 Fed. Reg. 72492, 72497 (Nov. 19, 2015).

Some commenters, like PNM and Transwestern do here, took issue with and opposed the tribal consent requirement "because a tribe could unilaterally stop other individual Indian land owners who have a majority interest from granting the right-of-way." *Id.* The BIA explained in response that, "tribal consent is required for any tract in which the tribe owns an interest, regardless of whether the tribal interest is less than a majority. Requiring tribal consent restores a measure of tribal sovereignty over Indian lands and is consistent with the principles of tribal self-governance that animate modern Federal Indian Policy." 80 Fed. Reg. at 72509.

Thus, these statutes and regulations make clear that tribally owed and individually owned lands are to be treated differently, and a right of way over the former cannot be obtained absent consent.

PNM and Transwestern argue that these regulations, whether the old or new version, have no place in the analysis here.[6] But as this Court explained in *Yellowfish v. City of Stillwater,* 691 F.2d 926, 930 (10th Cir. 1982), "Federal policy

[6] *See* PNM's Opening Brief at 14–18; Transwestern's Opening Brief at 29–30. Transwestern also argues that the district court errored by finding that later statutes or policies impliedly amend Section 357. Transwestern's Opening Brief at 22–29. The district court never made such a holding, however. That argument is therefore not addressed here.

toward Indians is often contained in several general laws, special acts, treaties, and executive orders, and these must be construed in pari materia in ascertaining congressional intent." *Id.* Congress clearly intended for Section 324 to preserve tribes' authority to prevent disposition or encumbrance of trust interests. *Plains Elec. Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1380 (10th Cir. 1976) (declining to allow condemnation of a right of way across tribal interests held in trust and noting that Section 324 is part of a comprehensive scheme governing the acquisition of rights of way that requires consent of the secretary and the tribe). And Congress expressly authorized the Secretary of the Interior to "prescribe any necessary regulations for the purpose of administering the provision of sections 323 to 328 of this title." 25 U.S.C. § 328. Thus, it cannot be disputed that Section 324 and its implementing regulations are germane to the analysis here.[7]

[7] Transwestern makes a passing reference to the ILCA Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1992 (2000) noting the statute referred to a fractional tribal interest as "owner of a portion of an undivided interest in Navajo Indian allotted land." Transwestern argues "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 ILCA support a tribal veto and that such lands become 'tribal lands'." Transwestern's Opening Brief at 26, fn. 11. This statute, however, never went into effect because Congress modified the law before the necessary certification from the Secretary was issued. *Cohen* at 1070–1071 (citing Pub. L. No. 106-462, § 207 (g), 114 Stat. 1991 (2000). Furthermore, the term "Navajo Indian Allotted land" is merely a statement regarding jurisdiction to denote which tribe has jurisdiction over the allotment.

d. Federal Courts Have Uniformly Upheld the Requirement of Tribal Consent and the Distinction Between Interests Owned by Tribes and Individual Indians.

Federal courts, including this one, have uniformly upheld the requirement of tribal consent for obtaining rights of way across tribal lands and recognized that lands held for the benefit of tribes and individual Indians are to be treated under separate statutory provisions.

This Court, for example, looked at the legislation that applies to rights of way across Indian lands in *United States v. Oklahoma Gas & Electric Co.*, 127 F.2d 349 (10th Cir. 1942), concluding that "a plain and clear distinction is made between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians." *Id.* at 354. In regard to Section 357, this Court noted (albeit in dicta), that its reach was limited:

> **Obviously, the power to condemn lands allotted in severalty to an individual Indian did not extend to Indian reservation, tribal lands, national forests,** and other lands under the exclusive jurisdiction of the Federal government. As to these lands, only the power to permit the use of a right-of-way under varying forms and conditions was authorized.

Id. at 353 (emphasis added).

In *Yellowfish*, 691 F.2d at 10, this Court remarked that "different treatment accorded by Congress to Indian tribal land and land allotted in severalty to individual Indians has been explained by several courts." Thus, it is clear that Congress intended for individually owned and tribally owned land to be treated

differently when it comes to rights of way, and that tribally owned lands are not subject to condemnation.

Additionally, no court has construed Section 357 to provide for the condemnation of tribal interests. In *United States v. Pend Oreille Public Utility District No. 1*, 28 F.3d 1544, 1552 (9th Cir. 1994) the Ninth Circuit held that "the Utility may be able to condemn land held in trust by the United States for the benefit of individual Indian allottees under 25 U.S.C. § 357, but this statute does not apply to land held in trust for the Tribe." In *NPPD*, the Eighth Circuit reasoned:

> 25 U.S.C. § 357 authorizes condemnation only of "lands allotted in severalty to Indians * * *." Before this action was filed, several individual Indians deeded fractional undivided interests in certain of the tracts of land to the United States, in trust for the tribe, reserving life estates in the lands. If the deeded land is now considered tribal land, as opposed to allotted land, it cannot be condemned pursuant to 25 U.S.C. § 357. Instead, consent of the Secretary and the proper tribal officials must be obtained pursuant to the 1948 Act. 25 U.S.C. § 324.

NPPD, 715 at 961 (citation is original). The same result is warranted here.[8]

[8] *See also Nicodemus v. Washington Power Co.*, 264 F.2d 614, 617-18 (9th Cir. 1959) (holding that 25 U.S.C. § 323 and § 357 "offer two methods for the acquisition of an easement across allotted Indian land for the construction of an electric transmission line. . . " and that "Congress, under section 357, expressly authorized the condemnation for any public purpose of lands allotted in severalty to Indians."); *United States v. 10.69 Acres of Land, More or Less, in Yakima County*, 425 F.2d 317, 318, n. 1 (9th Cir. 1970) ("Since the lands involved were unallotted tribal lands held in trust by the United States, it is conceded that the State could not condemn them.").

e. Even if Proceedings Under Section 357 Could be Characterized as in Rem, the Condemnation Action Against Other Owners Cannot Move Forward Under New Mexico or Federal Law.

PNM and Transwestern both argue that the in rem nature of proceedings under Section 357 change the outcome here. They are incorrect.

On its face, Section 357 has no language that addresses tribal sovereign immunity, let alone language that could be construed as an express abrogation or waiver of the Navajo Nation's immunity from suit. *Michigan v. Bay Hills Indian Community*, 134 S. Ct. 2024, 2031 (2014) (Congress may abrogate tribal immunity, but it must clearly express its intent to do so); *Santa Clara Pueblo*, 436 U.S. at 58–59 (noting that a tribe can waive its immunity, but such a waiver must be expressly made and cannot be implied). Thus, even if the plain language of the Section could be found to reach the tribal interests, it is clear that it does not authorize the Navajo Nation to be brought into the suit. *Cf Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) (noting that a "State may have authority to tax or regulate tribal activities occurring within the State, . . . However [that] is not to say that a tribe no longer enjoys immunity from suit.") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 510 (1991) (holding that power to tax does not mean state has power to enforce tax law in state court)).

However, Section 357 does specifically apply the law of the state in which the action lies. 25 U.S.C § 357 ("Lands allotted in severalty to Indians may be condemned for any public purpose **under the laws of the State or Territory where located**. . .")(emphasis added). The New Mexico Supreme Court has refused to recognize a meaningful distinction between an in rem and in personam claim in the context of tribal sovereign immunity. *Hamaatsa, Inc. v. Pueblo of San Felipe*, No. S-1-SC-34287, slip op available at 2016 N.M. LEXIS 148, at *22 (June 16, 2016) ("Because tribal sovereign immunity divests a court of subject matter jurisdiction it does not matter whether [the] claim is asserted in rem or in personam.") Thus, characterizing the claim as purely in rem does not allow PNM to proceed against the Navajo Nation.

Furthermore, as the district court discussed below, "A condemnation must bind all owners of property, and an incomplete condemnation judgment may be unenforceable." Aplt. App. at 85. Accordingly, because the Navajo Nation cannot be a party to the condemnation action, the action against the other defendants relating to the two parcels partially owned by the Navajo Nation also cannot move forward.

This is consistent with longstanding U.S. Supreme Court case law on condemnation, which has been followed by courts across the country, holding that if an indispensable party is not a party to the action, any judicial decision

condemning the land "has no binding effect." *Minnesota v. U.S.*, 305 U.S. 382, 386 n.1, 59 S.Ct. 292 (1939); s*ee also, Martin v. Wilks*, 490 U.S. 755, 761–62, 109 S.Ct. 2180 (1989) (stating as a general matter, judgments do not bind non-parties); *Jachetta v. United States*, 653 F.3d 898, 907 (9th Cir. 2011) ("If the United States is not a party to the action, any judicial decision condemning the land 'has no binding effect,' so 'the United States may sue to cancel the judgment and set aside the conveyance made pursuant thereto.'"); *Enable Oklahoma Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *5 (W.D. Okla. Aug. 18, 2016) ("judgment rendered in the Kiowa Tribe's absence would be inadequate because an incomplete condemnation judgment may be unenforceable. . . Because the Kiowa Tribe's interest cannot be condemned in its absence, any judgment rendered in the Kiowa Tribe's absence would be meaningless.") (citing *Jachetta*, 653 F.3d at 907).

That condemnation actions must include *all* owners of the property at issue is also consistent with Fed. R. Civ. P. 71.1(c)(3) which requires "When the [condemnation] action commences, the plaintiff *need join* as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff *must add* as defendants all those persons who have or claim an interest . . . ." (emphasis added).

New Mexico courts have followed this interpretation. In *Armijo v. Pueblo of Laguna*, 2011-NMCA-006 at 31, 149 N.M. 234, 241, 247 P.3d 1119, 1126, the New Mexico Court of Appeals held that the entire action involving the Pueblo, including cross-claims against other defendants for adverse possession to property in which the Pueblo held an interest, must be dismissed because the Pueblo was an indispensable party and would be prejudiced if litigation continued without its participation.

Thus, characterizing the claim as in rem instead of in personam does not change the result in this case due to the Nation's immunity from suit.[9]

f. There is Nothing to the "Parade of Horribles" Raised by the Energy Companies.

Both PNM and Transwestern prophesy that affirmation of the decision below will have disastrous effects on settled procedures and expectations of energy companies. Nothing could be farther from the fact.

The Court below made clear that the next step as to the two allotments is for the power company to obtain the right of way easement through negotiations:

> The Court finds that PNM is not completely without a remedy. PNM can acquire a voluntary easement under 25 U.S.C. §§ 323–328. As

[9] Because the Tribe's immunity prevents joinder, the issue of whether Section 357 authorizes condemnation of the subject tribal holdings is not a controlling issue of law and this Court could elect to pass on the question entirely. *See generally* 20-35 *Moore's Federal Practice Civil* § 305.15 (Procedures Following Grant of Permission to Appeal) (noting that the circuit court is not bound by the trial court's formulation of the questions of law as presented in the order).

> stated *supra*, this statutory scheme and administrative procedure is an alternative to § 357's condemnation of allotted land in federal court. *See generally* Miller, 26 Am. Indian L. Rev. at 121–25 (recognizing that the only way to obtain easements over tribal lands is by the procedures set out in §§ 323–328 and detailed in the regulations, which requires approval from the Secretary of Interior and written consent from the appropriate tribal officials)

Aplt. App. at 154–155 (citations in original). This is the absolute standard, long-settled procedure for rights of way on lands in which tribes have an interest.

Power and pipelines not only cross lands of individual Indians; of course they also cross lands wholly owned by tribes. On these lands, the companies always have to obtain rights of way through negotiation. In May 2007, Congress authorized a definitive study of procedures for obtaining rights of way on tribal lands. The genesis of the report was attempts by the power and pipeline industries to revoke tribal immunity from condemnation on the claim that the negotiated outcomes had adverse effects on energy prices. *See* Report to Congress, Energy Policy Act of 2005, Section 1813 Indian Land Rights-of-Way Study, by the U.S. Department of Energy and Interior.[10]

The Study first noted that currently the parties rely on negotiations between Indian tribes and energy companies to arrive at the terms of both the initial grant and renewals, which is in "keeping with long-standing Federal policies against the alienation of tribal lands without tribal consent and support for tribal self-

[10] Available at energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EPAct_1813_Final.pdf

determination."[11] *Id*. at 53. The Study included a number of case studies of successful negotiations, including negotiations between Defendant Navajo Nation and power companies. *See e.g.*, *id.* at 55. It found the requirement for tribal consent created "no demonstrable effect on energy costs for consumer, energy reliability or energy supplies . . ." and concluded that "broad changes to the current Federal policy of self-determination and self-governance for tribes . . . are not warranted at this time." *Id*. at 53.

Moreover, it is not surprising that the present system works. This is because the standard for determining fair value in a condemnation action is the value reached in private negotiation. That is, the condemnation action mimics the private negotiations.

Thus, in a condemnation action the "fair market value" is what a willing seller and a willing buyer agree as to price. *U.S. v. Consolidated Mayflower Mines, Inc*., 60 F.3d 1470, 1475 (10th Cir. 1995). In *Consolidated Mayflower Mines*, the Tenth Circuit upheld a jury instruction in a condemnation trial which defined "fair market value" as that

> sum of money which considering all of the circumstances . . . probably could have been obtained for the property on the open

[11] As the Study notes, the requirement of tribal consent for rights of way across lands held in trust for tribes has been the policy of the United States since the Indian Right-of-Way Act of 1948. *Id*. at § 3.2.

> market, that is the amount in terms of cash or its equivalent that in all probability would have been paid for the property after fair negotiations between a fully informed owner willing to sell and a fully informed purchaser willing and able to buy, with neither being under any compulsion to act and a reasonable time being allowed for negotiations. . . .

Id. That is, a condemnation valuation tries to reconstruct the fair market value that would have been obtained in a voluntary negotiation.

As noted, the Navajo Nation as well as other tribes routinely negotiates with energy companies on tribal lands which are wholly owned. There is no reason to believe that negotiations would be any more difficult on allotments, like these, on which the Nation is a partial owner.

CONCLUSION

For the reasons stated, the Individual Defendants request that the decision of the District Court be affirmed.

ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, Individual Defendants request oral argument. Oral argument will assist the Court in the decision making process, and will provide Individual Defendants the opportunity to respond to arguments of the United States, which were not disclosed prior to appellee briefs being due.

Dated: September 30, 2016 Electronically submitted,

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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 6,169 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 2016 in 14-point Times New Roman.

Dated: September 30, 2016 */s/ Michael M. Mulder*

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Defendant Individual Allottees' Response Brief, as submitted in Digital Form via electronic mail, was created on a system that has been scanned for viruses by Malwarebytes Anti-Malware version 2.2.1.1043, 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.

Dated: September 30, 2016 */s/ Michael M. Mulder*

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CERTIFICATE OF EXACT COPIES

I hereby certify that the hard copies of the foregoing Defendants-Appellees Individual Allottees' Response Brief, submitted to the clerk's office are exact copies of the ECF filing.

Dated: September 30, 2016 */s/ Michael M. Mulder*

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant Individual Allottees' Response Brief was served on September 30, 2016 via the Court of Appeals CM/ECF filing system to all parties in this appeal registered as CM/ECF users.

I further certify that on September 30, 2016, seven copies of the foregoing Defendant Individual Allottees' Response Brief were mailed, postage prepaid and properly addressed to:

Clerk of the Court
United States Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257

I further certify that on September 30, 2016, a copy of the foregoing Defendant Individual Allottees' Response Brief was sent via first-class U.S. Mail, postage prepaid, to the following pro se parties that do not appear to be registered with CM/ECF filing system:

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