No. 16-2050
Oral Argument Requested

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

and

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

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

RESPONSE BRIEF OF THE UNITED STATES

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Counsel is unaware of any related cases, and there are no prior or related appeals.

GLOSSARY

ILCA	Indian Land Consolidation Act
PNM	Public Service Company of New Mexico

JURISDICTIONAL STATEMENT

On June 13, 2015, PNM filed a complaint in the district court seeking to condemn a right of way for a power line across five parcels of allotted Indian land in New Mexico under 25 U.S.C. § 357. Aplt. App. 16–42. PNM invoked the district court's subject matter jurisdiction under Section 357 and 28 U.S.C. § 1331. Aplt. App. 17.

PNM identified the parcels as allotted Indian lands and named as defendants the United States, title holder of the land, as well as all beneficial owners. Aplt. App. 18–24 (¶¶ 8–24). For two of the parcels—identified as Allotment 1160 and Allotment 1392—PNM named the Navajo Nation as a defendant because it has an undivided fractional beneficial interest in those parcels. *Id.* at 18, 21–22.

The Navajo Nation moved to dismiss the condemnation action against Allotments 1160 and 1392 based on its sovereign immunity from suit and based on Federal Rule of Civil Procedure 19. Aplt. App. at 76–84. On December 1, 2015, the district court granted the Nation's motion and dismissed the condemnation action against Allotments 1160 and 1392 without prejudice. *Id.* at 156–58.

On March 2, 2016, the district court denied PNM's request to reconsider its earlier decision, Aplt. App. 292–326, but agreed to certify four questions for interlocutory appeal, *id.* at 324.

On March 15, 2016, PNM timely filed its petition for permission to appeal, which this Court granted on March 31, 2016. *See* Aplt. App. 14 (Dkt. No. 131). This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

(1) 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?

(2) 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?

(3) 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?

(4) 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

PNM seeks a fifty-foot wide right of way for a power line that runs for approximately sixty miles between transmission substations in Grants and Gallup, New Mexico. Aplt. App. 25 (¶¶ 27–28). The power line provides electric power to Gallup. The right of way crosses parcels

owned by non-Indians, parcels held by the United States in trust for the Navajo Nation, and fifty-seven allotted parcels held by the United States in trust for individual Indians (the Navajo Nation presently has an undivided fractional interest in twenty-eight of those parcels). Aplt. App. 32–41 (maps); *see also* PNM's Br. 8–9.

In 1960, the Bureau of Indian Affairs granted PNM a right of way for fifty years over the parcels held in trust by the United States for the Navajo Nation and individual Indians. *See* 25 U.S.C. § 323 (authorizing the Secretary of the Interior "to grant rights-of-way for all purposes" across lands "held in trust by the United States for individual Indians or Indian tribes"); Aplt. App. 25 (¶ 28).

Before the fifty-year period expired, PNM sought to renew its right of way under Section 323. Aplt. App. 26 (¶ 31). The Navajo Nation consented to the renewal across the parcels of wholly-owned tribal land, and the requisite number of individual beneficial owners (as explained below) consented for fifty-two of the allotted parcels. PNM filed this Section 357 condemnation action to condemn a right of way over the remaining five parcels, including Allotments 1160 and 1392.

I. Legal background

A. Tribal sovereignty

Indian tribes "remain 'separate sovereigns pre-existing the Constitution.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56

(1978)). They possess inherent sovereignty "over both their members and their territory." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). In recent decades, Congress and the executive branch have repeatedly acted to promote tribal self-determination. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 5301, et seq.); *see generally* Cohen's Handbook of Federal Indian Law § 1.07 (Nell Jessup Newton ed., 2012).

B. Allotment statutes

Toward the end of the nineteenth century, "the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253 (1992). "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Id.* at 254.

Congress first allotted land under various reservation-specific statues and treaties, and then, under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, it authorized the President to allot parcels of reservation land to individual tribal members—generally 40, 80, or 160 acres—without the consent of the Indian tribes. Aplt. App. 191.

The President could also allot public lands for settlement by individual Indians. *See* § 4, 24 Stat. 389 (codified at 25 U.S.C. §§ 334, 336) (Aplt. App. 192); *Morton v. Ruiz*, 415 U.S. 199, 226 n.22 (1974) ("public domain allotments").

To prevent individual Indians from selling allotted land shortly after acquiring it, the United States held each parcel in trust, generally for twenty-five years. *United States v. Mitchell*, 445 U.S. 535, 543 (1980). At the end of the trust period, the United States would then convey title to the individual allottee. If an individual allottee died during the trust period, the land descended under the laws of the State or Territory where it was located. *See* General Allotment Act of 1887, § 5, 24 Stat. 389 (Aplt. App. 192). Congress later allowed allottees to devise their interest in allotted land. *See* Act of June 25, 1910, ch. 431, § 2, 36 Stat. 856 (codified as amended at 25 U.S.C. § 373).

"The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976) (quoting *Mattz v. Arnett*, 412 U.S. 481, 496 n.18 (1973)).

C. Right-of-way statutes and Section 357

Congress passed several acts between 1866 and 1906 that "in various forms granted rights-of-way in the nature of easements across and upon public domain, national parks, Indian, and other reservations,

under the exclusive control of the National Government." *United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 352 (10th Cir. 1942), *aff'd* 318 U.S. 2016 (1943).

1901 Act, including Section 357. In a 1901 appropriations act, Congress authorized the Secretary of the Interior to grant rights of way for "telephone and telegraph lines" (Section 3) and for "public highways" (Section 4). *See* Act of March 3, 1901, ch. 832, 31 Stat. 1058–85.

In the first paragraph of Section 3 of the 1901 Act, Congress gave the Secretary the authority to grant rights of way for telephone and telegraph lines through

> any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty.

Id. § 3, 31 Stat. 1083 (codified at 25 U.S.C. § 319).

In the second paragraph of Section 3, Congress added a condemnation provision. "That 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." *Id.* § 3, 31 Stat. 1084 (codified at 25 U.S.C. § 357). Congress did not authorize condemnation of the other categories of lands (including tribal lands) listed in the first paragraph of Section 3.

1948 Act. In the Indian Right-of-Way Act, Congress authorized the Secretary of the Interior to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes" or "any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes." Act of Feb. 5, 1948, ch. 45, § 1, 62 Stat. 17–18 (codified at 25 U.S.C. § 323, et seq.).

When it passed the Indian Right-of-Way Act, Congress did not repeal, supersede, or alter earlier rights-of-way statutes containing specific statutory authorities and requirements. *See* 25 U.S.C. § 326. The earlier, specific right-of-way statutes coexist with the general later-enacted provisions of the 1948 Act. *See, e.g.*, *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058–59 (9th Cir. 1988).

Under the 1948 Act, "[n]o 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." § 2, 62 Stat. 18 (codified at 25 U.S.C. § 324). For lands held in trust for individual Indians, the Secretary can grant a right of way without the consent of all of the individual Indian owners in certain circumstances, including if "a majority of the interests" consent to the grant. *Id.* For rights of way, tribes and individual

Indians must be paid compensation that the Secretary determines to be just. *Id.* § 3, 62 Stat. 18 (codified at 25 U.S.C. § 325).[1]

D. Indian Reorganization Act and Indian Land Consolidation Act

The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984–988, ended the allotment of land to individual Indians, 25 U.S.C. § 5101, and extended indefinitely the period during which the United States held existing allotments in trust or restricted their alienation, *id.* § 5102. "[A]s successive generations came to hold the allotted lands," the parcels of land "splintered into multiple undivided interests." *Hodel v. Irving*, 481 U.S. 703, 707 (1987).

Congress addressed the fractionation problem in 1983 through the Indian Land Consolidation Act (ILCA), Pub. L. No. 97-459, 96 Stat. 2515 (codified as amended at 25 U.S.C. §§ 2201–2221). The Act provides numerous mechanisms for "eliminating undivided fractional interests in Indian trust or restricted lands or consolidating . . . tribal landholdings." 25 U.S.C. § 2203. A tribe can acquire a fractional interest ("less than 5 percent of the entire undivided ownership of the

[1] Congress further authorized the Secretary of the Interior to issue regulations to administer the 1948 Act. § 6, 62 Stat. 18 (codified at 25 U.S.C. § 328). These regulations are codified in 25 C.F.R. Part 169. The Department of the Interior recently amended the regulations, effective April 2016. *See* Rights-of-Way on Indian Lands, Final Rule, 80 Fed. Reg. 72,492 (Nov. 19, 2015).

parcel of [allotted] land") through intestate descent from an individual allottee, *id.* § 2206(a)(2)(D), or a tribe may purchase an interest in a parcel of allotted land at probate, *id.* § 2206(o). A tribe may also purchase an interest in allotted land "with the consent of the owner." *Id.* § 2212. And tribes can purchase, at fair market value or a matching offer, interests in trust and restricted land before the Secretary of the Interior terminates the trust or lifts the restriction on alienation. *Id.* § 2216(f).

The United States then holds title to any acquired interest in trust on behalf of the tribe. *Id.* § 2209. Under ILCA, tribes have acquired fractional beneficial interests in an increasing number of allotted parcels.

II. Factual background

This appeal concerns two allotted parcels. On May 31, 1919, the United States allotted 160 acres of land in New Mexico to Hostine Sauce (later known as Leo Frank, Sr.) as Allotment 1160. *See* Aplt. App. 32–33 (survey and map). In December 2006, the Navajo Nation acquired an undivided 13.6% interest in Allotment 1160 through two conveyances from beneficial owners under ILCA.

On February 16, 1921, the United States allotted 160 acres of land in New Mexico to Wuala as Allotment 1392. *See id.* at 38–39 (survey and map). In August 2009, the Navajo Nation acquired an undivided 0.14% interest in Allotment 1392 through intestate descent under

ILCA, as amended by the American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1809.[2]

In 2009, when PNM sought to renew its right of way under Section 323, it obtained written consent from the Navajo Nation for lands in which the entire interest is held in trust by the United States, 25 C.F.R. § 169.3(a) (2009), and consent from a majority of the beneficial owners for allotted lands held in trust by the United States, *id.* § 169.3(b). PNM submitted its right-of-way renewal application to the Bureau of Indian Affairs in November 2009. *See* Aplt. App. 26 (¶ 33).

In June 2014, a sufficient number of individual Indians revoked their consent to the right of way so that PNM no longer had consent from a majority of the beneficial interests in five of the allotted parcels. Because of this revocation, the Bureau of Indian Affairs notified PNM in January 2015 that it could not renew the right of way over these parcels. *Id.* (¶ 35).

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[2] The Supreme Court struck down ILCA's original escheat-to-tribe provision as an unconstitutional taking that required just compensation. *Hodel*, 481 U.S. at 717–18. The amended provision did not cure the constitutional deficiency. *Babbitt v. Youpee*, 519 U.S. 234, 238 (1997). Congress enacted the Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991, but the descent and devise provisions of that act were never implemented. *See* Cohen's Handbook of Federal Indian Law § 16.05[2][c]. The American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1809, took effect on June 20, 2006. *See id.*

III. Procedural background

Complaint. In June 2015, PNM filed a complaint in the United States District Court for the District of New Mexico seeking to condemn a perpetual right of way on the five allotted parcels under 25 U.S.C. § 357. Consistent with Federal Rule of Civil Procedure 71.1, PNM named as defendants the United States (holder of the title) and all beneficial owners. For two of the parcels—Allotments 1160 and 1392—PNM named the Navajo Nation as a defendant because the Nation has an undivided fractional interest in those parcels.

Answers. In its answer to PNM's complaint, the Navajo Nation urged the district court to dismiss the condemnation action against Allotments 1160 and 1392 because as an Indian tribe it "has sovereign immunity from suit and cannot be joined involuntarily as a defendant." Aplt. App. 44 (¶ 5(a)) (citing Fed. R. Civ. P. 19, and *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030–31). Even if it could be joined, the Nation argued that the parcels are "tribal land" that PNM cannot condemn under Section 357. *Id.* ¶ 5(b) (citing 25 C.F.R. § 169.1(d) (2015), and *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cty. of Thurston*, 719 F.2d 956, 961 (8th Cir. 1983)).

The United States raised the same arguments in its answer. *See* Aplt. App. 51.

Motion to Dismiss. The Navajo Nation moved to dismiss the condemnation action against Allotments 1160 and 1392 for lack of

subject matter jurisdiction. Aplt. App. 76–84. The Nation argued that PNM "improperly joined the Nation as a defendant, as the Nation has sovereign immunity from the condemnation suit." *Id.* at 76. "[A]s the Nation's property interest in the two allotments make[s] it an indispensable party, and as the Nation cannot be joined," the Nation argued that the "condemnation actions against Allotments 1160 and 1392 must be dismissed in their entirety." *Id.* at 77.

The individual defendants joined the Navajo Nation's motion. Aplt. App. 85–86. The United States filed a one-page statement that it had no objection to the Nation's motion. *Id.* at 112. PNM opposed. *Id.* at 87–111.

December 2015 opinion. The district court granted the Nation's motion and dismissed the action as to Allotments 1160 and 1392. Aplt. App. 157–58. The district court held that the plain language of Section 357 "only allows condemnation of allotted lands owned by individual tribal members" and "does not expressly apply to allotted lands acquired by Indian tribes." *Id.* at 138.

Once a tribe acquires an interest in an allotted parcel, the district court held, "the land is no longer land 'allotted in severalty to Indians.'" *Id.* at 148 (quoting 25 U.S.C. § 357) (citing *Neb. Pub. Power Dist.*, 719 F.2d at 962). PNM thus could not condemn rights of way over Allotments 1160 and 1392 under Section 357 "because the portion of the

Two Allotments owned by the Nation are now considered 'tribal land,' as opposed to allotted land." *Id.*

The district court recognized that it could have stopped its analysis at Section 357; nevertheless, it proceeded to address the applicability of Federal Rule of Civil Procedure 19. *Id.* The Navajo Nation, the district court concluded, is a required party under Rule 19(a) because it owns a fractional interest in the parcels of land and the Nation "will be affected by the perpetual easement PNM seeks." *Id.* at 150. "As a sovereign, the Nation has an independent interest to be free from involuntary condemnation" of the lands in which it has a property interest. *Id.* at 151. The district court concluded that the United States may not adequately protect the Nation's interest in asserting its sovereign immunity in a Section 357 condemnation proceeding. *Id.* at 151.

The district court further explained that, even if the United States could protect the Nation's sovereign immunity interests, Federal Rule of Civil Procedure 71.1 required PNM to join in the Section 357 condemnation action not only the title holder of each parcel (the United States), but also the beneficial owners (including the Navajo Nation). *Id.* at 152. The district court concluded that the Navajo Nation is therefore a required party that cannot be joined. *Id.* at 155 (citing Fed. R. Civ. P. 19(a)). The district court determined that it could not proceed

with the condemnation action against Allotments 1160 and 1392. *Id.* at 152–55 (considering the four factors from Fed. R. Civ. P. 19(b)).

The district court dismissed without prejudice PNM's action against Allotments 1160 and 1392. The court explained, however, that PNM "is not completely without a remedy" since it could still acquire a voluntary right of way under 25 U.S.C. §§ 323–28. *Id.* at 154.

PNM's motion to reconsider. PNM moved the district court to reconsider its decision and to set aside the order of dismissal. Aplt. App. 162–203. In the alternative, PNM asked the district court to certify four questions for interlocutory appeal. *Id.* at 185–87. The Navajo Nation, the United States, and the individual defendants opposed PNM's motion. *Id.* at 212–22, 231–49, 255–58.

March 2016 opinion. "[I]n the interest of clarity and completeness," the district court explained why it dismissed the condemnation actions against Allotments 1160 and 1392. Aplt. App. 301.

The district court agreed with PNM that, when Congress enacted Section 357 in 1901, all allotted land would be subject to condemnation for public purpose. Aplt. App. 303. But the district court declined PNM's invitation "to go a step further and find that once Congress allotted land to individual tribal members, the land remained subject to condemnation even after the land was reacquired in trust for a tribe under subsequent statutes." *Id.* at 303–04. The district court rejected

PNM's "once an allotment always an allotment" argument because it was not supported by the plain language of Section 357, case law, or historical context. *Id.* at 304.

PNM faulted the district court for not recognizing that a condemnation action is an in rem proceeding with "no indispensable parties." Aplt. App. 312 (quoting Wright & Miller, Fed. Practice & Procedure § 3045 (2d ed. 1997)). The district court concluded that PNM's in rem argument conflicted with binding precedent—*Minnesota v. United States*, 305 U.S. 382, 388 (1939), and *Town of Okemah v. United States*, 140 F.2d 963, 965 (10th Cir. 1944)—holding that the United States is an indispensable party in Section 357 condemnation proceedings.

The district court rejected PNM's policy arguments because "[i]t is Congress's job to consider and correct the negative effects of its laws." *Id.* at 319. If Congress wants "to open up the condemnation avenue over trust lands fractionally owned by tribes," then it can certainly do so. *Id.* at 320. But that is not the job for a federal court. *Id.*

SUMMARY OF ARGUMENT

Congress has the power to authorize the condemnation of tribal lands (or tribal interests in lands), but it did not exercise that power when it enacted Section 357. The text, structure, and context of the statute support this conclusion. Section 357 allows condemnation of "lands allotted in severalty to Indians" for any public purpose under

state law. When Congress enacted Section 357 in 1901, allotments were designed to become fee land within a designated period of years. The 1901 Congress did not anticipate that subsequently enacted statutes would result either in the United States still holding title to allotted parcels over a century later, or in undivided fractional individual and tribal ownership of beneficial interests of some parcels.

For allotted parcels with mixed tribal and individual Indian ownership, Section 357 does not authorize condemnation of fractional interests that the United States holds in trust for tribes because those interests are treated the same as any other tribal interest in real property. And because PNM may not condemn the Navajo Nation's fractional interests in the parcels, the district court below, like the Eighth Circuit in *Nebraska Public Power District*, 719 F.2d at 962, sensibly held that PNM's condemnation action may not proceed.

While a condemnor may, under general condemnation law, seek to condemn less than the total of all interests in a parcel of land, the Nation's undivided fractional interests in the lands may not be condemned even if the undivided fractional individual interests might be separately condemned, and without the Nation's consent PNM may not proceed with the activities for which it seeks the right of way in any event. At the very least, PNM must obtain the Navajo Nation's undivided fractional interest by negotiation, and would have to

separately condemn the individual Indians' interests held in trust by the United States.

In the district court, the United States argued that the Navajo Nation is a required party under Fed. R. Civ. P. 19(a), that Section 357 did not abrogate tribal sovereign immunity, and that the condemnation claims against the two allotted parcels had to be dismissed in their entirety under Rule 19(b). The three remaining certified questions concern these issues.

If the Court adopts PNM's interpretation of Section 357 that it may condemn all interests in an allotted trust parcel, including tribal interests, the action may proceed against the United States. Under Federal Rule of Civil Procedure 71.1, plaintiffs should name parties with an interest in the property as defendants. However, interested parties are not indispensable parties within the meaning of Rule 19(b) because condemnation proceedings are in rem proceedings. The condemnor pays just compensation for the property interest that it takes, and the district court then distributes the compensation, regardless of whether all interested parties participated in the proceedings.

The United States, as the title holder of allotted trust lands, is an indispensable party in a Section 357 condemnation action. But it does not follow that the beneficial owners are also indispensable parties under Rule 19(b). A tribe and individual Indians can participate in the

condemnation proceedings if they so choose; but if they do not, the United States acts as the trustee for the interests being condemned (individual and tribal).

This Court need not address whether Congress abrogated tribal sovereign immunity when it enacted Section 357 because the Navajo Nation is not an indispensable party in this proceeding.

STANDARD OF REVIEW

The interpretation of 25 U.S.C. § 357 is a question of law, which this Court reviews de novo. *Dalzell v. RP Steamboat Springs, LLC*, 781 F.3d 1201, 1207 (10th Cir. 2015).

The district court's conclusion that the Navajo Nation "is a required party under Rule 19(a) or an indispensable party under Rule 19(b) is reviewed for an abuse of discretion." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012) (citing *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001)). A district "court abuses its discretion in making an indispensability determination 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 v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003). This Court reviews de novo legal conclusions underlying the district court's Rule 19 analysis. *Id.*

The district court's conclusion that the Navajo Nation is entitled to sovereign immunity is a question of law, which this Court reviews de

novo. *Nanomantube v. Kickapoo Tribe, Kan.*, 631 F.3d 1150, 1151 (10th Cir. 2011).

ARGUMENT

I. Section 357 does not authorize the condemnation of interests in allotted lands held in trust for tribes

Congress has never enacted a statute generally authorizing the condemnation of tribal lands or specified that tribal fractional interests in an allotted parcel must be treated differently from other tribal interests in land. Congress never contemplated authorizing the condemnation of tribal interests in allotted lands, and the Court should not now determine that Congress authorized that by implication. This Court should interpret Section 357, consistent with that background legal framework, not to authorize the condemnation of tribal interests.

A. The text and historical context of the 1901 Act show that Congress did not authorize the condemnation of tribal interests in allotted lands

Statutory text. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

Section 357 provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or

Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 25 U.S.C. § 357. When Congress enacted the 1901 Act, including the condemnation provision codified as Section 357, Congress understood that there were two categories of Indian land: (1) land in which a tribe held the entire beneficial interest; and (2) land "allotted" to individual Indians under the 1887 General Allotment Act or specific allotment statutes or treaties in which a tribe held no interest.

The text of Section 357 does not authorize condemnation of the first category of Indian land; it expressly addresses only the second category—allotted parcels. The United States "allotted" parcels of land to individual Indians, not to tribes. And in a Section 357 condemnation action against an allotted parcel, Congress directed the money awarded as damages to be paid to the individual "allottee," not to tribes.

"Allotment is a term of art in Indian law," which refers to "a selection of specific land awarded to an *individual allottee* from a common holding." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142 (1972) (emphasis added); *see also* Henry C. Black, Dictionary of Law 62 (West Publishing Co. 1891) (the verb "allot" referred to the distribution or apportionment of "property previously held in common among those entitled, assigning *to each* his ratable portion, to be held in severalty") (emphasis added); William C.

Anderson, Dictionary of Law 51 (Chicago 1893) ("to set apart a portion of a particular thing or things *to some person*") (emphasis added).

As of 1901, when Congress enacted Section 357, it was expected that the United States would convey fee simple title for each allotted parcel to the *individual Indian* allottee (or his heirs) at the end of the trust period (generally 25 years). *See, e.g.*, General Allotment Act of 1887, § 5, 24 Stat. 389. After the trust period ended, the United States would issue a fee patent to the individual Indian (or his heirs), the trust would be "discharged," and the parcel would be "free of all charge or incumbrance whatsoever." *Id.*

It thus makes sense that Congress provided that allotted parcels would be treated "in the same manner as land owned in fee." 25 U.S.C. § 357. Section 357 provided a means to condemn allotted parcels (that would relatively soon become "land owned in fee") for public purposes prior to the end of the trust period. It also makes sense that Congress required the condemnor to pay the "allottee"—*i.e.*, the individual Indian (or his heirs)—"the money awarded as damages" in a Section 357 condemnation action. *Id.*

All parties agree that Section 357 authorizes condemnation of an allotted parcel in which the entirety of the beneficial owners are individual Indians. PNM's Br. 10; Transwestern's Br. 13; *see also United States v. Okla. Gas & Elec. Co.*, 318 U.S. 206, 214–15 (1943) ("[Section 357] made allotted lands, but not reservations, subject to

condemnation for any public purpose."); *Minnesota*, 305 U.S. at 383–84 (Section 357 condemnation proceeding against nine parcels of land "allotted in severalty to individual Indians"); *Alaska Dep't of Nat. Res. v. United States*, 816 F.3d 580, 587 (9th Cir. 2016) (under Section 357, the State can condemn a trail easement on Indian allotments without the United States' consent); *Yellowfish v. City of Stillwater*, 691 F.2d 926, 930 (10th Cir. 1982) (Section 357 allows "a state-authorized condemnor to obtain a right-of-way over allotted lands"); *Town of Okemah*, 140 F.2d at 966 (Section 357 provides for condemnation of "allotted lands restricted against alienation").

Nor should there be any question that Section 357 does not authorize condemnation of a parcel in which a tribe is the sole beneficial owner and which has never been allotted. *See United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1551–52 (9th Cir. 1994) (utility cannot condemn land held in trust for the Kalispel Tribe but it may condemn land held in trust for individual allottees); *United States v. 10.69 Acres of Land, More or Less, in Yakima Cty.*, 425 F.2d 317, 318 n.1 (9th Cir. 1970) ("unallotted tribal lands held in trust by the United States" cannot be condemned under Section 357); *Okla. Gas & Elec. Co.*, 127 F.2d at 354 (Congress made "a plain and clear distinction . . . between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians," and did not authorize the condemnation of the former); *United States v.*

Minnesota, 113 F.2d 770, 773 (8th Cir. 1940) (Section 357 "does not purport to authorize the maintenance of condemnation proceedings affecting tribal lands, but only 'lands allotted in severalty to Indians.'" (quoting 25 U.S.C. § 357)).

Of course, in 1901 Congress could not have anticipated that the United States would still hold legal title to allotted parcels over a century later, or that tribes would one day reacquire (or acquire in the case of public domain allotments) beneficial interests in those parcels. Congress did not contemplate authorizing the condemnation of tribal interests in allotted land in 1901 since none existed.

When Section 357 is read in the context of the 1901 Act as a whole, and in the context of other federal statutes, it does not authorize the condemnation of tribal interests in an allotted parcel with mixed ownership.

Statutory structure. Congress enacted Section 357 in the second paragraph of Section 3 of the 1901 Act. In the first paragraph of that section, Congress gave the Secretary of the Interior the authority to grant rights of way for telephone and telegraph lines "through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory . . . or through any lands which have been

allotted in severalty to any individual Indian under any law or treaty." Act of March 3, 1901, § 3, 31 Stat. 1083 (codified at 25 U.S.C. § 319).[3]

But in the second paragraph, Congress only authorized condemnation of "lands allotted in severalty to Indians." *Id.* Congress has the power to authorize the condemnation of tribal lands or tribal interests in land. *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656–57 (1890); *see also 10.69 Acres in Yakima Cty.*, 425 F.2d at 320 ("Congress may provide for the condemnation of Indian tribal lands."). Yet Congress did not exercise that power in the 1901 Act. Congress instead opted to use the terms "allotted" and "allottee" in Section 357, terms that denote individual Indians and not tribes. Congress never

[3] Congress had authorized the Secretary to permit rights of way on Indian lands for power lines in a separate statute just two weeks earlier in the Act of February 15, 1901. While the act did not expressly apply to Indian allotments, the United States interpreted it to apply to Indian allotments. *See Okla. Gas & Elec. Co.*, 318 U.S. at 214–15. Unlike the 1901 Act, the Act of February 15, 1901 specified that such permission "may be revoked by [the Secretary] or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park," ch. 372, 31 Stat. 790–91.

provided a general authorization for the condemnation of lands (or interests in lands) held by the United States in trust for tribes.[4]

Historical context. Congress enacted Section 357 at a time when it supported an allotment policy. Yet, even as of 1901, Congress's allotment policy stopped short of terminating the federal government's recognition of the sovereignty of Indian tribes. As a result, Congress treated tribes and individual Indian allottees differently.

Principles of tribal sovereignty had been firmly established and repeatedly articulated by the Supreme Court. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 556–57 (1832) ("treat [tribes] as nations" and "respect their rights . . . as distinct political communities"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) ("domestic dependent nations"). Congress and the President repeatedly recognized the sovereignty of Indian tribes through treaties, statutes, and executive orders, which had not been repudiated as of 1901. The 1901 Act was itself an act "for fulfilling treaty stipulations with various Indian tribes" for the fiscal year ending June 30, 1902, and most of the act was devoted to that purpose. *See* 30 Stat. 1058–83.

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[4] Congress has authorized the limited condemnation of tribal interests in lands by railroad companies. *See, e.g.*, Act of Feb. 28, 1902, ch. 134, § 3, 32 Stat. 43, 44 (authorizing a railroad company to condemn "any lands" held by "any of the Indian nations or tribes" in the Oklahoma Territory); Act of June 27, 1898, ch. 502, § 2, 30 Stat. 493, 494 (allowing a railroad company to condemn lands of the Creek and Choctaw nations).

Congress in 1901 looked to the Secretary of the Interior to oversee Indian affairs, including granting rights of way for various purposes over lands in which tribes had beneficial interests, as long as the United States maintained a trust relationship with tribes. In the 1901 Act, Congress gave the Secretary authority to grant rights of way across both tribal lands and allotted lands, while authorizing condemnation only of "lands allotted in severalty to Indians." In these circumstances, the most reasonable interpretation of Section 357 is that Congress did not authorize condemnation of tribal interests in allotted parcels. The acquisition of tribal interests would be subject to the authority of the Secretary.

Taken to its logical conclusion, PNM's contrary argument would allow condemnation of a parcel even if a tribe reacquires (or acquires in the first instance in the case of public domain allotments) 100% of the beneficial interests under ILCA. Neither the text, the structure, nor the broader context of the 1901 Act supports that result, or any application of Section 357 to tribal interests in an allotment. The district court explained: "PNM has not cited," and the district court did not locate, "a case holding that a parcel of land previously 'allotted in severalty to' an individual Indian, but later transferred to the United States in trust for a tribe, is subject to condemnation under § 357 because the parcel is identified as an 'allotment.'" Aplt. App. 304.

Indian canon of construction. Even if the statute were ambiguous, statutory ambiguities are to be resolved in favor of tribal sovereignty. When faced with two (or more) possible constructions of a statute, the choice should be guided by the longstanding principle of Indian law that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cty. of Yakima*, 502 U.S. at 269 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767–68 (1985)); *see also Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 177 (1989) ("ambiguities in federal law are, as a rule, resolved in favor of tribal independence"); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) ("federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence'" (quoting *White Mountain Apache Tribe*, 448 U.S. at 144 (alterations in original)); *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (endorsing the "well-established canon of Indian law that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" (internal quotations and citations omitted)); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191, 1195 (10th Cir. 2002) (en banc) ("We . . . 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."); *Okla. Gas & Elec. Co. v. United States*, 609 F.2d 1365, 1367 (10th Cir. 1979) ("[W]e resolve doubtful legislative expressions in favor of Indians.") (citing *Squire v. Capoeman*, 351 U.S. 1, 6–7 (1956)). Under that established principle, a tribal interest in a mixed parcel cannot be condemned.

The 1948 Act. Moreover, reading Section 357 not to authorize condemnation of tribal interests in mixed-ownership parcels of allotted land respects and conforms to Congress's protection of tribal control over tribal land through the 1948 Right-of-Way Act. Following the 1948 Act, individual Indians in four cases opposed Section 357 condemnation actions filed against them, arguing that the 1948 Act impliedly repealed Section 357. This Court and the other courts of appeals held that Section 357 was not impliedly repealed but survived as an alternative means for obtaining a right-of-way over an allotted parcel. *Neb. Pub. Power Dist.*, 719 F.2d at 961; *Yellowfish*, 691 F.2d at 930; *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982); *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614, 618 (9th Cir. 1959).

But that does not mean that the 1948 Act does not have a bearing on the interpretation of Section 357 in these new circumstances of mixed tribal and individual Indian ownership of allotted parcels. Congressional intent in both statutes is best respected by concluding that a right of way as to the tribal interest in an allotted parcel must be obtained through the 1948 Act, which requires tribal consent. 25 U.S.C.

§ 324 ("No grant of a right-of-way over and across lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials."); *see also* 25 C.F.R. § 169.107(a) (2016) ("For a right-of-way across tribal land, the applicant must obtain tribal consent."); 25 C.F.R. § 169.3(a) (2015) (requiring "prior written consent of the tribe").

Judicial precedent. PNM asserts (Br. at 10) that courts have consistently held that a "parcel may be condemned regardless of which persons or entities own fractional interests in such parcel." This assertion is not supported by the cases it cites. In *United States v. Clarke*, 445 U.S. 253 (1980), the Supreme Court held that Section 357 requires the party desiring to use an allotment for a public purpose to file a condemnation action and does not put the burden on the individual allotment owners or the United States to bring an inverse condemnation action. And in *Southern California Edison Co. v. Rice*, 685 F.2d 354, 355 (9th Cir. 1982), the Ninth Circuit rejected the individual allotment owners' argument that, under state law, allotments are "property appropriated to public use" such that the utility had to allege that its proposed power line use was either compatible with or more necessary than the existing use. Neither case addressed the issue before this Court.

The Eighth Circuit is the only appellate court to apply Section 357 in the context of mixed-ownership allotted parcels (*i.e.*, individual and tribal ownership interests), and the court specifically held that tribal

interests may not be condemned. *See Neb. Pub. Power Dist.*, 719 F.2d at 962.

Before the Nebraska power company filed its Section 357 condemnation action, some individual Indian owners deeded their undivided interests in fifteen allotments to the Winnebago Tribe and reserved life estates for themselves. *Neb. Pub. Power Dist. v. 100.95 Acres of Land in Cty. of Thurston*, 540 F. Supp. 592, 595 (D. Neb. 1982). The district court and Eighth Circuit devoted most of their analysis to the questions whether the 1948 Right-of-Way Act impliedly repealed Section 357 and whether the conveyances from the tribal members to the Winnebago Tribe were valid. The courts then addressed the question whether Section 357 authorized condemnation of mixed-ownership parcels.

The power company conceded that it had "no right to condemn tribal lands" and argued "that the interests obtained by the Tribe in approximately fifteen allotments do not create tribal lands, but instead that such parcels remain allotted lands subject to condemnation under 25 U.S.C. § 357." *Id.* The district court rejected that argument by looking to the definition of tribal land under a regulation implementing the 1948 Right-of-Way Act, 25 C.F.R. § 161.1(d) (1981),[5] which defined

[5] In 1982, the Department of the Interior designated its Part 161 regulations as Part 169. *See* Redesignation for Title 25, Final Rule, 47 Fed. Reg. 13,326, 13,327 (Mar. 30, 1982).

tribal land as "land or *any interest therein*, title to which is held by the United States in trust for a tribe." *Id.* at 604 (emphasis added).

The district court gave "great deference" to the Department of the Interior's "longstanding administrative interpretation" of tribal lands under the Part 169 regulations. *Id.* at 604 (citing *Bowles v. Seminole Rock Sand Co.*, 325 U.S. 410 (1945)). And the court held that Section 357 does not authorize the power company to condemn "tracts of trust land in which the Tribe has undivided interests." *Id.* at 605.

The Eighth Circuit affirmed. It similarly looked to Interior's definition of "tribal land" under the 1948 Act, 25 C.F.R. § 169.1(d) (1982), and concluded that the conveyances created "tribal land not subject to condemnation under Section 357." *Neb. Pub. Power Dist.*, 719 F.2d at 962.[6]

In sum, treating tribal fractional interests in real property as tribal land not subject to condemnation under Section 357 best effectuates congressional intent, the longstanding practice of treating

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[6] PNM relies (Br. 21) on *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685, 694–95 (N.D. 2002), a condemnation action filed in state court under a state statute, not Section 357, in which a private landowner attempted to block a project by selling a parcel to an Indian tribe with no obvious connection to the property. The court explained that the 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." *Id.* That case does not illuminate the proper interpretation of Section 357.

tribal trust land differently from land allotted to individual Indians, and the federal government's support for tribal sovereignty as expressed in numerous statutes and executive-branch policies.

B. Because tribal interests cannot be condemned, it makes sense that individual interests should not be condemned either

The question then is whether the individual interests in a mixed-ownership allotment can be condemned. PNM argues that Congress intended Section 357 to authorize condemnation of a parcel as a whole. *See* PNM's Br. 10–14. That is, either all the interests in a parcel can be condemned or no interests in a parcel can be condemned. That interpretation is plausible based on factual circumstances as of 1901 when there were only two categories of Indian land, and Section 357 plainly applied to one of them (allotments) but not the other (tribal land). But PNM draws the wrong conclusion in applying its all-or-nothing interpretation of the statute to mixed-ownership parcels. As we demonstrated above, Congress did not authorize condemnation of tribal land (or interests in land), which precludes condemnation of mixed-ownership parcels under an all-or-nothing approach.

The Eighth Circuit concluded in *Nebraska Power*, without extended analysis, that a condemnation action against an allotted parcel in which a tribe holds some interest must be dismissed as to all the interests in the parcel. The Eighth Circuit, like the district court in that case, did not consider whether the condemnation action could

proceed solely against the individual interests in the allotted parcels. Since the Winnebago Tribe opposed the project, the courts had little reason to consider it.

But there is considerable practical force and common sense to the Eighth Circuit's conclusion, and that of the district court in this case, that the condemnation action should not go forward since the entity seeking the right of way would not have been able to obtain all the interests required for an effective easement even if it had been able to condemn the individual interests. When the tribe has not consented to the granting of a right of way by Interior, and because its interests cannot be condemned, a right of way or other easement cannot be obtained by the utility.

This result is consistent with subsequent legislation such as the Indian Reorganization Act and ILCA which are designed to prevent further erosion of the tribal and Indian land base, and to promote tribal cohesiveness in that base, including allotments.[7] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (determining Congress's purpose by reference, among other things, to the context of other statutes, including subsequently enacted statutes).

[7] Through ILCA, Congress sought to "promote tribal self-sufficiency and self-determination" and "to reverse the effects of the allotment policy on Indian tribes." 25 U.S.C. § 2201 note.

C. Even if individual interests in a mixed-ownership parcel can be condemned, tribal interests cannot be

Even if PNM can proceed against the individual interests in a Section 357 condemnation action, it cannot proceed against the tribal interests. It would not be anomalous to so hold.

1. In mixed-ownership parcels, the Department of the Interior treats tribal interests differently

Limiting condemnation to the individual interests in a mixed-ownership parcel of allotted land would be consistent with the Department of the Interior's interpretation of the 1948 Act governing consensual rights of way over Indian lands. As noted above, Interior defined "tribal land" as "land or any interest therein, title to which is held by the United States in trust for a tribe." 25 C.F.R. § 169.1(d) (2015). "Individually owned land" was defined as "land or any interest therein held in trust by the United States for the benefit of individual Indians." 25 C.F.R. § 169.1(b) (2015).[8]

Interior recently explained in the context of its revised right-of-way regulations that an allotted parcel can be both "tribal land" and "individually owned Indian land," and that the two categories of

[8] In *Nebraska Power*, 719 F.2d at 962, the Eighth Circuit looked to the definition of "tribal land" under 25 C.F.R. § 169.1(d) (1982), but not to the definition of "individually owned land," which also included "land or *any interest therein* held in trust by the United States for the benefit of individual Indians." 25 C.F.R. § 169.1(b) (1982) (emphasis added). The definitions in the revised regulations are similar. *See* 25 C.F.R. § 169.2 (2016) (defining "tribal land" and "individually owned land").

undivided interests can be treated differently. *See* 80 Fed. Reg. at 72,496. Some commenters questioned how the Department classifies tracts with mixed ownership, where "both a tribe and an individual own interests." *Id.* Interior explained: "A tract in which both a tribe and an individual own interests would be considered 'tribal land' for the purposes of requirements applicable to tribal land and would be considered 'individually owned Indian land' for the purposes of the interests owned by individuals." *Id.*

While the right-of-way regulations do not govern condemnation proceedings, *see id.* at 72,517, Interior's interpretation of the 1948 Right-of-Way Act supports an interpretation of Section 357 that could allow a parallel result.

Interior treats "tribally owned land differently than individually owned land" when granting a voluntary right of way "because, although the U.S. has a trust responsibility to all beneficial owners, it has a government-to-government relationship with tribes and seeks to promote tribal self-governance." *Id.* at 72,492. Regardless of the size of the tribe's fractional interest, the Secretary of the Interior may not issue a right of way without the tribe's consent. *Id.* at 72,509 ("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"); *see also* 25 U.S.C. § 324; 25 C.F.R. § 169.107(a) (2016).

The district court correctly recognized that the amended regulations show "deference toward tribal ownership and tribal governance of land even when a tribe owns a small interest in the land." Aplt. App. at 310. Such deference is an important aspect of the federal policy of respecting tribal sovereignty, a policy which must be taken into account when construing ambiguous statutes in all contexts.[9]

2. A condemnation action need not include all ownership interests

It is possible to condemn fewer than all interests in property so that "[t]he interests of others are not cut off or affected." *Day v. Micou*, 85 U.S. 156, 162 (1873). The Confiscation Act at issue in *Day* allowed the seizure and condemnation of property held by certain classes of persons who fought against the United States. *Id.* at 161. The Act authorized the condemnation of "the estate and property of the offending person, and no other." *Id.* Thus, the estate of an offending

[9] Transwestern argues that the Part 169 regulations are inconsistent with ILCA, which does not give tribes "veto power" over leases or rights of way on allotted parcels in which a tribe has acquired a fractional interest. Transwestern's Br. 26–27. Transwestern has not filed suit to challenge Interior's regulations, and in any event, Interior explained that its right-of-way regulations rely primarily on their authority under the 1948 Indian Right-of-Way Act (25 U.S.C. §§ 323–328), and not ILCA's leasing provisions (25 U.S.C. § 2218). *See* 80 Fed. Reg. at 72,509. For an allotted parcel in which a tribe owns a fractional interest (*i.e.*, "less than a majority interest"), the Department requires tribal consent for a right of way because it "restores a measure of tribal sovereignty over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy." *Id.*

person was subject to condemnation without affecting "other interests in the land." *Id.* at 162.

The same approach would be permissible here. In federal condemnation proceedings, "the ultimate question of what is 'property' within the just compensation clause of the Fifth Amendment is a federal question." *United States v. 967,905 Acres of Land, More or Less, in Minn. Ctys.*, 447 F.2d 764, 769 (8th Cir. 1971) (citing *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943)). Under federal law, a condemnor can define the scope of the property it seeks to condemn so that it takes less than the total of all interests.

It is well established that undivided fractional interests in an allotted parcel are individual estates. *See, e.g.*, *Bradburn v. Shell Oil Co.*, 173 F.2d 815, 816–17 (10th Cir. 1949) (Shell paid proceeds from oil royalties to Bradburn for her undivided two-fifths interest in allotted land). This is so where all the interest holders are individual Indians, as in *Bradburn*, and where there is an allotted parcel with mixed ownership. The City of Oklahoma City, for example, seeks to condemn under Section 357 a perpetual right of way over nineteen tracts of allotted land in *Oklahoma City v. 100-foot-wide Permanent Easement*, No. 15-cv-00274 (W.D. Okla.).

On one tract, a non-Indian owner previously granted a permanent easement covering his undivided 25% fractional interest, and that interest is not subject to the City's condemnation action. *See* Plaintiffs'

Response to Gov't Mot. to Dismiss 4, *Oklahoma City v. 100-foot-wide Permanent Easement*, No. 15-cv-00274 (W.D. Okla. Oct. 16, 2015) (Doc. 27). Individual Indians own an undivided 73.125% fractional interest, and a tribe owns the remaining undivided 1.875% fractional interest. *Id.*

The City took the position that Section 357 "expressly authorizes condemnation for . . . public purposes as against restricted interests of individual Indians," but Section 357 "does not expressly authorize condemnation against interests owned by tribes." *Id.* at 5. The City, therefore, seeks to condemn only the interests held by individual Indians under Section 357. *Id.*

In a case that did not involve a tribal interest in an allotted parcel, this Court has acknowledged that less than all of the undivided interests in an allotted parcel can be condemned under Section 357. In *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977),[10] Transok wanted to acquire easements across the surface of seven restricted allotments in Oklahoma, as well as rights with respect to the mineral interests in those tracts, for the underground storage of natural gas. Non-Indian Darks and a restricted Indian owned the surface of

[10] Relevant facts can be found in this Court's decision and in the district court's August 22, 1975 Journal Entry of Judgment in *Transok Pipeline Co. v. An Easement in Hughes Cty.*, No. 73-186 (E.D. Okla. Aug. 22, 1975), Appendix B to the petition for certiorari filed by Agnes Wesley, at 1978 WL 223386.

Tract 1 as co-tenants. Darks also owned the surface of Tract 2, and non-Indian Olivo owned the surface of Tract 6.

After it failed to reach an agreement with all of the owners, Transok brought a Section 357 condemnation action against the United States as "[g]uardian of the legal title" of the restricted Indian interests and against the non-Indian owners. 1978 WL 223386, App. B. The government represented all the restricted Indian owners and settled as to them. The district court entered a judgment of condemnation on August 22, 1975 as to the interests of the restricted Indian owners, but not as to the interests of the non-Indians, Darks and Olivo. *See id.* (condemning under Section 357 one-half of the surface interest in Tract 1, "the mineral interest only" in Tract 2, and "an undivided 23/24ths of the mineral interest only" in Tract 6). The district court's judgment, which this Court affirmed, demonstrates that undivided fractional interests can be condemned under Section 357 without condemning the entirety of the estate (surface or mineral).

The district court condemned the remaining interests of Darks and Olivo at trial. They appealed, arguing, among other things, that the district court lacked jurisdiction to condemn non-Indian interests in allotted parcels. This Court rejected their challenge without "rely[ing] solely on the trial court's first theory that § 357 confers federal jurisdiction over non-Indians who hold an interest in land in which allotted Indians also hold an interest." *Transok Pipeline*, 565 F.2d at

1154. The Court instead rested its decision on a theory of pendent-party jurisdiction. *Id.* at 1154–55.

Section 357 can be used to condemn the undivided fractional interests of individual Indians in lands in which non-Indians hold fractional interests, and that approach could be taken in the case of lands in which tribes hold fractional interests. As a practical matter, a party seeking a right of way would likely want to negotiate a right of way for the tribe's interest first, since the condemnor cannot obtain a right of way without tribal consent. If acquisition of the tribal interest is successfully negotiated and the Bureau of Indian Affairs grants the right of way under 25 C.F.R. Part 169 as to the tribal interest, the party can then acquire the individual Indian interests separately through negotiation or, failing that, condemn any outstanding non-tribal interests under Section 357.

In this case, PNM could negotiate a right of way with the Navajo Nation for its 13.6% interest held in trust by the United States on behalf of the tribe, and then, if necessary, seek to condemn the 86.4% undivided fractional interest in Allotment 1160 held in trust by the United States on behalf of individual Indians under Section 357. The size of the fractional interest does not matter; PNM could do the same thing for Allotment 1392.

II. Assuming Section 357 allows the condemnation of tribal interests, an Indian tribe with an undivided fractional interest in an allotted parcel is an interested and required party in a Section 357 condemnation action seeking to condemn that interest

Federal courts follow federal civil procedure in Section 357 condemnation proceedings. *See* Fed. R. Civ. P. 71.1(a), (k). Rule 71.1 "affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure." *Id.* Advisory Committee Notes, Original Report, Note to Subdivision (a).

Federal Rule of Civil Procedure 71.1(c)(1) provides that "[t]he plaintiff must . . . name as defendants both the property—designated generally by kind, quantity, and location—and at least one owner of some part of or interest in the property." PNM accordingly named the property and the United States as a defendant. Rule 71.1(c)(3) further states:

> When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired.

PNM identified the persons who held a beneficial interest in the allotted parcels and named them in its complaint as defendants. PNM named the Navajo Nation as a defendant because it believed that the Nation is "a beneficial owner of certain of the Allotments" and it "may have an interest in the Property as indicated by BIA records." Aplt. App. 24 (¶ 24).

The district court correctly held that, under Rule 71.1(c)(3), the defendants named in this action, including the Navajo Nation, are "persons required to be joined if feasible" under Rule 19(a). Aplt. App. 135, 149–52; *see also* Wright, et al., 7 Fed. Prac. & Proc. Civ. § 1604 (3d ed. 2015) ("Rule 19(a) defines those persons who should be joined as parties to the action.").[11]

In arguing that the Nation is not a required party under Fed. R. Civ. P. 19(a), PNM ignores Rule 71.1. *See* PNM's Br. 25.

III. A Section 357 condemnation action can proceed in the absence of an Indian tribe that holds an undivided interest in a parcel of allotted land

As an alternate ground for dismissing PNM's Section 357 action against Allotments 1160 and 1392, the district court held that, as a fractional owner of the allotted parcels of land, "the Nation is an indispensable party that cannot be joined due to sovereign immunity."

[11] The Navajo Nation would not be a required party in a Section 357 action in which the plaintiff sought to condemn only the interests of individual Indian owners.

Aplt. App 297, 306. If the Court determines that Section 357 authorizes condemnation of tribal interests, this Court must address the district court's alternate ground for dismissal that the Navajo Nation is an indispensable party.

Rule 19(b) does not require the dismissal of a condemnation action if the condemnor cannot join as a defendant a beneficial owner of a fractional interest in the allotted parcel.

It is well established that "a condemnation proceeding is a proceeding in rem." *Collins v. City of Wichita, Kan.*, 225 F.2d 132, 135 (10th Cir. 1955); *see also United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946); *United States v. 6.45 Acres of Land*, 409 F.3d 139, 145 (3d Cir. 2005). A beneficial owner may decide to participate in the in rem proceeding or not. *See* Fed. R. Civ. P. 71.1(e). Either way, the condemnor pays compensation to the court, and it will be distributed to the beneficial owners.

In this Section 357 condemnation action, the United States holds title to the allotted parcels, and PNM seeks to take the necessary title from the United States. The Supreme Court has held that the United States, as title holder of allotted land, is an indispensable party in a Section 357 condemnation proceeding. *Minnesota*, 305 U.S. at 386. When Congress authorized Section 357 condemnation proceedings, it gave permission "by implication" for the United States to be sued in federal court. *Id.* at 388–89. But *Minnesota* did not hold that beneficial

Indian owners (individual or tribal) are indispensable parties in a condemnation action against a trust allotment.

Under general principles of condemnation law, "[a]ll persons having any interest in the property should be made parties defendant in a condemnation action." Wright, et al., 12 Fed. Prac. & Proc. Civ. § 3045 (2d ed. 2015); *see also United States v. 499.472 Acres of Land in Brazoria Cty, Tex.*, 701 F.2d 545, 550 n.6 (5th Cir. 1983) (same). Interested parties "are entitled to be heard and, if their claims are sustained, to share in the proceeds." 12 Fed. Prac. & Proc. Civ. § 3045. But because condemnation proceedings are in rem, "the failure to join a party does not defeat the condemnor's title to the land, though the [interested] party will retain his or her right to compensation."[12] *Id.*

Although it is not directly on point, the Supreme Court's analysis in *Heckman v. United States*, 224 U.S. 413 (1912), supports the conclusion that, in Section 357 condemnation actions, the United States, as title holder, is the sole indispensable party and Indian beneficial owners are not indispensable parties. In *Heckman*, the United States brought suit to cancel conveyances of allotted lands in

[12] Wright & Miller failed to note the Supreme Court's holding in *Minnesota*, 305 U.S. at 386, that the United States is an indispensable party in a Section 357 condemnation action, which is a limited exception to the general rule that there are no indispensable parties in in rem condemnation proceedings.

Oklahoma by members of the Cherokee Nation because the conveyances violated statutory restrictions on alienation. *See id.* at 415–16.

The Supreme Court in *Heckman* first rejected the argument that the United States could not maintain such an action, explaining that Congress intended the United States, "as trustee, to have an active interest in the proper disposition of allotted Indian lands." *Id.* at 443. The Supreme Court then rejected the argument that the actions could proceed only if the Indian grantors were also made parties. "It was not necessary to make these grantors parties, for the government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances." *Id.* at 445. The grantees, moreover, were not in danger of double litigation: "[I]f the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation." *Id.* at 445–46.

The United States "has a real and direct interest" in the guardianship it exercises over the Indian tribes; "the interest is one which is vested in it as a sovereign." *United States v. Minnesota*, 270 U.S. 181, 194 (1926). In *Heckman*, the government "was formally acting as a trustee" when it sought to cancel the conveyances, but the United States "was in fact asserting its own sovereign interest in the

disposition of Indian lands, and the Indians were precluded from intervening in the litigation to advance a position contrary to that of the Government." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011). "Such a result was possible because the Government assumed a fiduciary role over the Indians not as a common-law trustee but as the governing authority enforcing statutory law." *Id.*

This circumstance is similar to that presented by the United States' representation of the interests of Indian tribes when defending claims of federal reserved Indian water rights in general stream adjudications conducted under the McCarran Amendment, 43 U.S.C. § 666. That statute provides consent to determine federal reserved rights held by the United States on behalf of Indians in state court water right adjudications, see *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809–13 (1976), but a tribe on whose behalf the water right is held by the United States is not an indispensable party to the proceeding, see *Arizona v. San Carlos Apache Tribe*, 463 US 545, 566 & n.17 (1983).

Of course, tribes can present their own views in Section 357 condemnation proceedings on such matters as whether the condemnation is authorized under Section 357 and state law and what amount of compensation is just for the condemnation of their property interests, just as they can choose to participate in McCarran Amendment proceedings. But they are not indispensable parties,

without whom a condemnation action may not proceed. The United States, as an indispensable defendant in an in rem proceeding to condemn the interests it holds in trust in an allotted parcel, will ensure that the compensation is distributed to the beneficial owners even if they do not participate in the proceedings.

Ordinarily, a court first decides whether a tribal defendant has sovereign immunity. And if the court concludes that the tribe does, it analyzes whether Rule 19(b) requires dismissal of the entire action. However, in the specific circumstances of a condemnation action, this Court can determine that a tribe is not an indispensable party without analyzing whether Congress abrogated tribal sovereign immunity when it enacted Section 357.

IV. Congress did not abrogate tribal sovereign immunity when it enacted Section 357

"Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Congressional abrogation of tribal sovereign immunity must be "unequivocal." *Nanomantube*, 631 F.3d at 1153. The abrogation of tribal sovereign immunity "cannot be implied." *Santa Clara Pueblo*, 436 U.S. at 58; *see also Bay Mills Indian Cmty.*, 134 S. Ct. at 2330–32.

Contrary to PNM's argument, Congress did not expressly or unequivocally abrogate tribal sovereign immunity when it enacted Section 357. PNM relies on *Minnesota*, 305 U.S. at 388, but it misreads the decision. In that case, the Supreme Court held that Section 357 impliedly waived the sovereign immunity of the United States and that the United States is an indispensable party in a Section 357 condemnation action. The Supreme Court did not address the abrogation of tribal sovereign immunity.

In *Minnesota*, the Supreme Court concluded that Congress necessarily waived the United States' sovereign immunity because Section 357 would otherwise have no effect. 305 U.S. at 386–87. In contrast, however, there is no necessary abrogation of tribal sovereign immunity because Section 357 actions can proceed without the participation of the tribe or individual Indians who hold beneficial interests in an allotted parcel.

If this Court concludes that tribal interests in a mixed-ownership allotted parcel are subject to condemnation under Section 357, tribes and individual owners can participate if they choose as provided in Rule 71.1. But if they choose not to participate, the United States will proceed, presenting any defenses concerning the interpretation of Section 357 or state law, and then distribute the compensation paid by the condemnor for any interests in property subject to condemnation.

Because Congress has not amended Section 357 "for more than a century," PNM claims that inaction somehow amounts to the abrogation of tribal sovereign immunity. PNM's Br. 30. PNM provides no support for its bare-bones argument. To abrogate tribal sovereign immunity, "Congress must 'unequivocally' express that purpose." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2031 (quoting *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)). Congress did not do that when it enacted Section 357.

PNM also looks to ILCA to support its argument that Congress "apparently understood" that it had already abrogated tribal sovereign immunity in Section 357 condemnation actions. PNM's Br. 30. Under ILCA, Congress declared that a tribe with an undivided interest in allotted land is "a tenant in common with the other owners." 25 U.S.C. § 2213(a). Yet context matters. As a tenant in common with the other owners, the tribe can lease property, sell resources from the land, "consent to the granting of rights-of-way" (referring to 25 U.S.C. §§ 323–328), or engage in other activities that might affect the land. *Id.*

Congress emphasized, however, that nothing within these provisions "shall be construed to affect the sovereignty of the Indian tribe." 25 U.S.C. § 2213(c)(2). These statutory provisions therefore cannot amount to an unequivocal congressional abrogation of tribal sovereign immunity. *See* PNM's Br. 30–31.

Even if the Court concludes that Congress did not abrogate tribal sovereign immunity, PNM claims that the Navajo Nation waived its tribal sovereign immunity when it acquired an undivided interest in allotted lands. *See* PNM's Br. 31–32. In its view, the Nation had "constructive notice" that allotted lands are subject to Section 357 condemnation actions and that this Court has never held otherwise, even after a tribe acquires an undivided interest in the lands. *Id.* 32. It is unclear how the Nation's actions amount to anything other than an implied waiver of tribal sovereign immunity, which courts generally refuse to condone. *See Santa Clara Pueblo*, 436 U.S. at 58.

CONCLUSION

This Court should affirm the dismissal without prejudice of the condemnation actions against Allotments 1160 and 1392.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The United States respectfully requests oral argument in this interlocutory appeal concerning the interpretation of 25 U.S.C. § 357. Tribes have acquired fractional beneficial interests in an increasing number of allotted parcels, and this Court's interpretation of Section 357 could affect those interests. Oral discussion of the facts and the applicable precedent would benefit the Court.

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that a copy of the foregoing brief, as submitted in digital form, was created on a system that has been scanned for viruses by System Center Endpoint Protection, version 1.229.581.0, as updated on September 30, 2016, and according to the program, is free of viruses.

I also certify that all required privacy redactions have been made, and the paper copies submitted to the clerk's office are exact copies of the ECF filing.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b).

I certify that 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 I prepared it using Microsoft Word in a proportionally-spaced typeface, Century Schoolbook 14-point.

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CERTIFICATE OF SERVICE

I certify that, on September 30, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. All case participants registered as CM/ECF users will be served by the CM/ECF system.

I also certify that, on September 30, 2016, I sent a copy of the foregoing brief via first class mail to:

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