No. 16-2050
IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF NEW MEXICO, Plaintiff-Appellant, v. APPROXIMATELY 15.49 ACRES OF LAND IN MCKINLEY COUNTY, NEW MEXICO, et al., Defendants-Appellees,	)

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

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[PROPOSED] BRIEF OF AMICUS CURIAE TRANSWESTERN PIPELINE COMPANY, LLC IN SUPPORT OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S PETITION FOR REHEARING EN BANC SEEKING REVERSAL

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EXHIBIT A

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GLOSSARY

1901 Act	Act of March 3, 1901, § 3, 31 Stat. 1083-1084
GAA	General Allotment Act of 1887, 24 Stat. 388
ILCA	Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221
Section 357	25 U.S.C. § 357, § 3, 31 Stat. 1084

CORPORATE DISCLOSURE STATEMENT

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

INTRODUCTION

Transwestern Pipeline Company, LLC[1] submits this brief amicus curiae supporting the petition of Public Service Company of New Mexico ("PNM"), filed July 7, 2017 (Doc. 01019837632) ("Petition"), seeking rehearing *en banc* of the panel decision rendered May 26, 2017 ("panel opinion" or "Op."). As PNM's Petition demonstrates, rehearing is appropriate because this proceeding involves a question of exceptional importance, whether 25 U.S.C. § 357 ("Section 357"), which specifically authorizes condemnation of "[l]ands allotted in severalty," is deprived of effect whenever a Native American tribal nation ("Tribe") acquires any interest in an allotment.

Transwestern has an interest in this case: Transwestern is a natural gas company transporting natural gas in interstate commerce pursuant to a certificate of public convenience and necessity pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h). Like PNM, Transwestern has rights-of-way crossing tribal and allotted lands, including across Allotment No. 1392, one of the allotments at issue in this proceeding. The panel opinion will directly affect Transwestern's ability to discharge its federally mandated responsibilities, as well as the ability of other companies and governments requiring access to serve public purposes, to acquire and preserve present and future rights-of-way across "lands allotted in severalty."

[1] This brief was authored solely by Transwestern's counsel and was funded solely by Transwestern.

Rehearing *en banc* also is warranted under Fed. R. App. P. 35(b)(1)(A)(B), because the panel opinion 1) conflicts with Section 357's plain language and intent, as well as this Court's precedent applying Section 357, including *Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977); 2) conflicts with the Supreme Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); and 3) ignores the language and import of the very congressional enactments by which the Navajo Nation acquired its interests in Allotments 1160 and 1392.

ARGUMENT

I. THIS PROCEEDING INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

En banc rehearing of the panel decision is warranted given the destructive effect the panel opinion will have on Congress' intent that companies and state and local governments be allowed to exercise state-law condemnation authority "in the same manner as land owned in fee" over "lands allotted in severalty to Indians." Section 357. The panel opinion, if it stands, negates the condemnation authority provided by Congress in Section 357, whenever a Tribe obtains an interest in such lands. While the panel opinion's effects will be felt throughout the States in this Circuit, it will have broader effects because nearly 11 million acres remain in trust

as allotments across the United States.[2] Given the areal extent of allotted land and the importance of, and need for, existing and future State law-authorized infrastructure on those lands, the question whether tribal acquisition of any interest in "lands allotted in severalty" transforms the land to "tribal lands" no longer subject to Section 357 is one of exceptional importance warranting rehearing *en banc*.

II. THE PANEL OPINION CONFLICTS WITH SECTION 357 AND TENTH CIRCUIT PRECEDENT.

A. Section 357's Plain Language Authorizes Condemnation of "Lands Allotted in Severalty" Regardless of Subsequent Ownership.

Section 357 unambiguously provides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose[.]" Congress enacted Section 357 in 1901, as part of the Act of March 3, 1901, in pertinent part, 31 Stat. 1084, and against the backdrop of the General Allotment Act of 1887, 24 Stat. 388 ("GAA"). The GAA and other allotment acts were

> fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving west. As a result of these combined pressures, Congress passed a series of surplus land Acts at the turn of the century to force

[2] Hearing on the Department of the Interior's Land Buy-Back Program Before the S. Comm. on Indian Affairs, 2 (2016) (statement of Michael Connor, Deputy Secretary, U.S. Dep't of the Interior, https://www.doi.gov/sites/doi.gov/files/uploads/dep_sec_testimony_before_scia_2016.pdf.

> Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement.

Solem v. Bartlett, 465 U.S. 463, 466-67 (1984). The GAA and similar acts "allotted" approximately 41 million acres of formerly tribal lands to individual Indian landowners. *See Cohen's Handbook of Federal Indian Law*, § 16.03[2][b], p. 1073 to 1074 (Nell Jessup Newton ed., 2012 ed.). Those allotments were "checkerboarded" with millions of acres of newly patented non-Indian lands.

In enacting Section 357, the 1901 Congress unquestionably responded to the effects of the allotment policy on access for essential transportation and utility services to the interspersed fee and allotted lands. Although the 1901 Act authorized the Secretary of the Interior to grant access for telephone and telegraph services, 1901 Act, § 3, and for highways, *id.* § 4, it further ensured access through authorizing State law eminent domain, *id.* § 3. The nearly 11 million acres of allotted land still in trust status today require that Congress' intent to subject "lands allotted in severalty" to condemnation remain effective.

The panel places great emphasis on its observation that Section 357 neither mentions "tribal lands" nor independently authorizes condemnation of tribal lands. Op. 15. However, neither does Section 357 employ the term "allotment," upon which the panel focused to discern intent: "'Allotment' is an Indian law term of art that refers to land awarded to an individual Indian from a common land holding." Op. 15. Although the allotments in this case fit the quoted definition, one roughly

synonymous with "lands allotted in severalty," the panel's emphasis on this non-textual term reflects its misguided effort to discern Congressional intent from sources beyond Section 357's text. The question whether the lands in this case were, in fact, "allotted in severalty to Indians," can only be answered in the affirmative.

The panel reads too much into Section 357's silence regarding condemnation of tribal lands.[3] That silence is entirely consistent with the allotment-era Congress' goals to reduce the role of Tribes and reduce tribal land holdings. Given those goals, the 1901 Congress need not have contemplated every type of party that might obtain an interest in lands allotted. Its intent was that, "lands allotted in severalty" be subject to condemnation "in the same manner as land owned in fee," regardless of what statute authorized the allotment, or who might receive an interest in the lands. Section 357. There is no indication the 1901 Congress intended that tribal acquisition of an interest in lands allotted in severalty, or acquisition by any other person or entity, whether Indian or the non-Indians

[3] The panel also misunderstood the import of the paragraph preceding Section 357's authorizing text in the 1901 Act. Op. 8, 15. The panel's attempt to distinguish "reservation" lands from allotments ignores that allotments were issued both within and outside reservations. *See Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962). It cannot credibly be contended that Section 357 is inapplicable to on-reservation allotments. Considerations applicable to the complex allotment-era history of tribal lands in the "former Indian territory," now Oklahoma, are inapplicable here.

whom Congress must have recognized would acquire allotment interests, would defeat Section 357's condemnation authorization.

The panel, citing, *Solem*, 465 U.S. at 468, "refuse[d] to extrapolate to amend the plain language of Section 357" from the expectation that allotment terminate reservations. Op. 17. To the extent *Solem*'s reservation diminishment analysis is relevant, *Solem* confirms the need to ground interpretation in the language of the specific allotment act, and "the circumstances underlying its passage." *Solem*, 465 U.S. at 469. Section 357 was passed under circumstances compelling Congress to ensure that needed infrastructure could be provided across the millions of acres of allotted lands interspersed with non-Indian lands. And, *Solem* begins with the governing principle that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470. By inferring that allotted lands in which a Tribe acquires an interest become "tribal lands," losing their allotted status, the panel judicially usurps Congress' exclusive authority to change the status of "lands allotted in severalty."

The panel faults PNM for requiring the panel to insert language into Section 357's text to reach PNM's result. Op. 17 n.3. Yet, for the panel to reach its conclusion, it had to do just that, because Section 357 contains no indication that a

Tribe's acquisition of an interest in "lands allotted in severalty" transforms those lands into "tribal lands."

B. The Panel's Interpretation of Section 357 Conflicts with Tenth Circuit Precedent.

The panel opinion conflicts with *Transok Pipeline Co.*, 565 F.2d 1150. The panel incorrectly characterizes *Transok* as holding that Section 357 applies to "allotted land even after that land has passed to individual heirs of the allottees." Op. 17. *Transok* unambiguously states that the Court affirmed jurisdiction under Section 357, rejecting the contention that jurisdiction failed because the "appellants Darks and Olivo . . . are not Indians." *Transok*, 565 F.2d at 1151. *Transok* does not state that the non-Indian appellants were "individual heirs of the allottees." They were non-Indians, whose interests were not held in trust by the United States and hence were in no sense allottees.[4]

The 1901 Congress unquestionably would have contemplated such non-Indian, non-trust interests. *See* Act of Feb. 8, 1887, 25 U.S.C. § 348 (stating that an allotment is for the use of the allottee or, "in case of [the allottee's] decease, of his heirs according to the laws of the State or Territory where such land is located"); s*ee also* 25 U.S.C. § 373 (authorizing devise of interests in allotted lands in 1910).

[4] While *Transok* contains an alternative pendent jurisdiction holding, the Court confirmed the validity of the district court's Section 357 holding: "We do not rely 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*, 565 F.2d at 1154.

Consistent with *Transok*, Section 357 can only achieve its intended effect if held to apply to "land allotted in severalty," regardless of subsequent ownership.

The panel also failed to accord sufficient weight to the consideration underlying *Yellowfish v. Stillwater*, 691 F.2d 926, 931 (10th Cir. 1982): "If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines." The panel opinion provides a roadmap for this result—on a national scale. Rehearing is warranted before the panel opinion dramatically overturns considerations underlying the delivery of utility services and highway and road transportation across the millions of acres of former tribal lands "allotted in severalty to Indians."

III. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT ANALYZING THE APPLICABILITY OF *IN REM* STATUTES TO TRIBES AND TRIBAL INTERESTS.

In summarily dismissing the import of the *in rem* nature of Section 357, Op. 22, the panel misconstrued *County of Yakima*, 502 U.S. 251 ("*Yakima*"), discussed in Transwestern's Brief of Intervenor-Appellant (Doc. 01019651563) at 18-20 and Reply Brief (Doc. 01019714480) at 18-20. The panel's attempt, *see* Op. 27 n.7, to distinguish *Yakima* on grounds that the lands at issue in that case were reobtained by the Yakima Nation in fee simple, as opposed to retaining trust status as here, is entirely unfounded. The panel disregards the clear distinction within *Yakima*: It affirmed "*in rem*" state taxation of formerly allotted *land* reacquired by a Tribe

within its reservation, but invalidated "*in personam*" taxation of excise tax on *sales* of such lands. 502 U.S. at 265-70.

Yakima unquestionably rests on the premise that Section 6 of the GAA, when it subjected *lands* patented in fee under Section 5 of the GAA to state taxation, remained applicable when the lands were reacquired by a Tribe in fee, precisely because the statute operated *in rem* upon the lands. The *in rem* effect of Section 6 controlled even though "'[a]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians." *Yakima*, 502 U.S. at 258 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Here, Section 357 operates *in rem* because it applies to identified *lands*, those "allotted in severalty." Congress' expression of intent, in prototypical eminent domain terms, with respect to such lands mandates that they remain subject to condemnation without regard to subsequent ownership. *Yakima* establishes that tribal, or others', acquisition of an interest in "land allotted in severalty" does not insulate that interest from actions under the *in rem* provisions of Section 357.[5]

[5] The panel provides no rationale for its suggestion that *Yakima* is inapplicable because it involved "local taxing authority," not condemnation. Op. 27 n.7.

IV. THE PANEL DECISION CONFLICTS WITH THE STATUTES AUTHORIZING THE NAVAJO NATION'S ACQUISITION OF ITS INTERESTS.

The panel misunderstood the import of the "congressionally approved mechanisms" by which "the Navajo Nation acquired its interests."[6] Op. 21. The panel acknowledges that the Navajo Nation obtained its interests in Allotments 1160 and 1392 by virtue of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2221 ("ILCA"), Op. 10; *see also* 25 U.S.C. § 2204(a)(1) (authorizing tribal purchase of interests in trust or restricted land); *id.* § 2206(a)(2)(D)(iii) (providing for escheat to Tribe of interests less than 5% if no other eligible heirs); *id.* § 2212 (authorizing Secretary to acquire interests on behalf of a Tribe). However, the panel ignores that ILCA's text repeatedly contradicts its conclusions. Congress did not refer to allotments in which a Tribe acquires an interest as "tribal lands" or otherwise suggest that those lands would lose their allotted status—rather, Congress repeatedly used the word "allotted land" when discussing allotted lands in which a Tribe has acquired an undivided interest under ILCA.

ILCA Section 214, 25 U.S.C. § 2213(c), which governs "[a]dministration of acquired fractional interests," describes tribally-acquired fractional interests as an "undivided interest *in allotted land held by the Secretary in trust for a tribe*[,]"

[6] Contrary to the panel opinion's characterization, Op. 27 n.7, Transwestern provided additional, substantive arguments regarding ILCA and its guidance in interpretation of Section 357.

(emphasis added), and provides that an approved lease or agreement applies to a Tribe's undivided interest, even though the Tribe did not consent to the lease or agreement and entitles the Tribe to proportional payment under the lease or agreement. ILCA Section 219, 25 U.S.C. § 2218(d)(2), similarly describes an allotment in which a Tribe acquires an interest as "allotted land held in trust for a tribe."

These ILCA provisions prescribing administration of tribally acquired interests demonstrate, contrary to the panel opinion, that Congress did not intend for tribal acquisition of an interest in "lands allotted in severalty" to transform that land into "tribal land." Instead, by identifying lands in which Tribes obtain an interest as allotted lands, and by expressly allowing leases and rights-of-way across those lands without an acquiring-Tribe's consent, Congress confirmed the continued allotted status of those lands and declined to give Tribes a veto.[7] The panel's observation that ILCA and similar statutes "say nothing about" condemnation, Op. 20, sidesteps Congress' clear intention to subject interests it authorized Tribes to acquire to the operation of extant statutes authorizing transfers of "allotted lands."

[7] That the Interior Department, in its discretion, adopted regulations, rightly or wrongly, giving Tribes a veto over allotted rights-of-way does not imply that judicial interpretation of Section 357 must ignore ILCA's plain legislative intent.

CONCLUSION

The Court should grant PNM's petition for rehearing *en banc*.

Date: July 17, 2017

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CERTIFICATE OF COMPLIANCE

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

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Date: July 17, 2017

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CERTIFICATE OF SERVICE

I, Deana M. Bennett, hereby certify that on the 17th day of July, the foregoing was filed through the CM/ECF system, which will send notification of this filing to all parties who have registered to receive service under this system. I, Deana M. Bennett, also hereby certify that on July 17, 2017, copies of the foregoing were sent first class mail to the following:

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