**No. 17-6188**

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**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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**ENABLE OKLAHOMA INTRASTATE TRANSMISSION, LLC,**
**Plaintiff-Appellant,**
**v.**
**A 25 FOOT WIDE EASEMENT, *et al.*,**
**Defendants-Appellees.**

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**Appeal from the United States District Court**
**for the Western District of Oklahoma**
**CIV-15-1250-M**
***The Honorable Vicki Miles-LaGrange, District Judge***

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# APPELLEES' BRIEF

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**ORAL ARGUMENT REQUESTED**

## RULE 26.1 DISCLOSURE STATEMENT

The Appellees are individuals. There are no entities that have an interest in the outcome of this appeal that are required to be disclosed.

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## STATEMENT OF PRIOR OR RELATED APPEALS

There have been no prior appeals in this action. Appeal No. 17-6088 is an appeal from a case asserting claims for trespass to the same allotment of land that is at issue in this appeal.

## INTRODUCTION

Dissatisfied with an earlier decision of the Bureau of Indian Affairs ("BIA") denying an application for an easement to run a natural gas pipeline across Indian land, Enable Oklahoma Intrastate Transmission, LLC ("Enable") filed an action to take that easement by condemnation. But Enable did not obtain the consent of the property's beneficial owners—the Kiowa Tribe of Oklahoma and numerous individual Indian allottees, members of the Kiowa, Comanche, Caddo, Apache, and Cherokee Tribes ("the Landowners")—and ignored the express objection of the great majority of those beneficial owners. The district court promptly dismissed the case for lack of subject matter jurisdiction.

On appeal, Enable now contends that this dismissal was wrong. According to Enable, its condemnation claim is permitted by 25 U.S.C. § 357. But, as Enable concedes in its brief, its entire argument for why the district court erred is contrary to this Court's recent decision in *Public Service Company of New Mexico v. Barboan*, 857 F.3d 1101 (10th Cir. 2017), where this Court held that § 357 does not apply to land in which a tribe holds an undivided interest. And instead of arguing why

*Barboan* does not apply, Enable instead argues that *Barboan* was wrongly decided. Because this Court is bound by its prior panel decisions, Enable's arguments are inconsequential.

Because *Barboan* controls, the Court need not consider Enable's argument for why the district court's alternative basis for dismissal is wrong—that the Tribe's undivided interest in the tract made it a required party to this action under Federal Rules of Civil Procedure 19 and 71.1, and that dismissal was appropriate because the Tribe could not be joined as it is a sovereign that is immune from suit. If the Court reaches this issue, Enable's arguments are meritless. There is simply no *in rem* exception to tribal sovereign immunity with respect to trust land.

Finally, Enable's argument that the district court erred in using out-of-state rates to calculate the attorneys' fees awarded to the Landowners is baseless. Enable's arguments are contrary to those advanced in the district court and should be rejected for that reason alone. Indeed, Enable invited the district court to apply the law it now complains about. And even if this Court entertains Enable's arguments, those arguments fail. Oklahoma law is not as inflexible as Enable

suggests, particularly where, as the record establishes in this case, impoverished landowners were unable to secure Oklahoma counsel to represent their interests and would not have been represented had out-of-state counsel not agreed to take their case.

The district court's orders should be affirmed in all respects.

## STATEMENT OF JURISDICTION

The Landowners concur with Enable's Statement of Jurisdiction, except that they contend that the district court correctly held that it lacked subject matter jurisdiction over this action.

## STATEMENT OF ISSUES

1. Did the district court correctly hold that it did not have subject matter jurisdiction because 25 U.S.C. § 357 does not permit condemnation of allotted lands in which a Tribe holds an undivided beneficial interest?

2. Did the district court correctly hold that the Kiowa Tribe of Oklahoma was a required party to this condemnation action under Federal Rules of Civil Procedure 19 and 71.1, and that dismissal was warranted because the Kiowa Tribe could not be joined because it is immune from suit?

3. Did the district court correctly award attorneys' fees to the Landowners?

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND[1]

This case involves a tract of trust land called Emaugobah Kiowa Allotment 84, also known as Section 28, Township 7 North, Range 11 West, Caddo County, Oklahoma ("Allotment 84" or "the Property"). (App. 14–24.) One of the beneficial owners of Allotment 84 is the federally recognized Kiowa Indian Tribe of Oklahoma (*see* 80 Fed. Reg. 1942-02, at *1944 (Jan. 14, 2015) (listing the Tribe as one of 566 federally recognized tribes)). The other beneficial owners are several individual members of the Kiowa, Apache, Caddo, and Comanche Tribes. (App. 52–59.) The owners of Allotment 84 hold undivided fractional interests in the Property, varying from 28.6% down to less than 9/10ths of a percent. The Tribe owns a 1.1% undivided interest in the Property. (App. 53.) Allotment 84 is held in trust by the United States for the benefit of all of the owners. (*See* App. 16, 52.)

[1] The Factual Background is limited to the evidence the district court considered in determining whether it had subject matter jurisdiction over Enable's condemnation claim and in resolving the Landowners' motion to dismiss under Federal Rule of Civil Procedure 19.

On November 19, 1980, the United States granted Enable's predecessor, Producer's Gas Company, a 20-year easement to construct and operate a natural gas pipeline across a portion of Allotment 84. (App. 60–61.) The easement expired on November 18, 2000. On June 14, 2002, Enogex, Inc., successor in interest to Producer's Gas, wrote to the BIA applying for a new twenty-year easement. (App. 62–64.) But Enogex was unable to obtain the landowners' consent. Ms. Marcie Davilla, the largest beneficial interest owner, rejected Enogex's offer by returning the Landowner Consent to Grant of Right-of-Way document with "Voided" written across it. (App. 65.)

Despite the landowners' rejection of Enogex's offer, on June 23, 2008, Robin Phillips, the Acting Superintendent of the BIA's Anadarko Agency, approved Enogex's application for the easement. (App. 66–67.) One month later, thirteen owners of Allotment 84 again rejected Enogex's offer for an easement by consent. (App. 68.) Twelve of those landowners separately wrote to Ms. Phillips, requesting that she withdraw her decision approving Enogex's renewal request. (App. 69.)

On March 23, 2010, the BIA vacated Ms. Phillips's June 23, 2008 decision, finding that the Anadarko Agency improperly approved the

easement without the landowners' consent, and that the compensation Enogex offered the landowners to obtain the easement was likely inadequate. (App. 70–74.) The BIA remanded the case for "further negotiation" and instructed that "[i]f valid approval of a right of way for this tract is not timely secured, Enogex should be directed to move the pipeline off the subject property." (App. 73.)

More than five years after the Regional Director's decision was issued, Enable had still not obtained an easement by consent, nor had it removed its pipeline. On November 11, 2015, Enable filed its Complaint to take by eminent domain the easement that the Landowners had repeatedly refused to convey by consent. (App. 14–24.)

The Landowners sought out local legal representation, but were not able to locate any Oklahoma attorney who would represent them, let alone an attorney with expertise in Indian law. (App. 276–77.) It was difficult to find *pro bono* representation of the Landowners (all indigent individual Indians) because of the complexity of the issues involved in this case. While Oklahoma has legal programs directed toward Indian law specialization, such as the Oklahoma Indian Legal Services ("OILS"), OILS did not have the manpower or financial resources to

take on an action of this size. (App. 346–48.) Further, the Landowners found that there are a limited number of attorneys in Oklahoma who practice Federal Indian law and even fewer who do so on a *pro bono* basis. (App. 347.)

The Landowners' difficulty in finding representation was compounded by the fact that this action involved the intersection of federal law, state law, tribal law, and a government agency, coupled with thirty-eight individual owners with varying sizes of interests in the original Kiowa allotment. (App. 347–48.) It thus further required counsel that had built relationships of trust with those tribal members. (App. 347.) OILS could identify no Oklahoma attorney who could represent the Landowners in this action. Kilpatrick Townsend & Stockton LLP, which has an active Indian law practice and *pro bono* practice, then agreed to represent the Landowners. (App. 347–48.)

## II. PROCEDURAL HISTORY

Enabled filed its Complaint asserting a single claim to condemn a 25 foot wide right of way across the Property pursuant to 25 U.S.C. § 357, Oklahoma Statutes Title 18 O.S. § 437.2, 27 O.S. § 7, and 66 O.S. § 50-60 inclusive. (App. 17.) Enable pled that "Rule 71.1(k) of the

Federal Rules of Civil Procedure applies" to its condemnation claim. (App. 17.)

The Landowners responded by filing a motion to dismiss pursuant to Rules 19 and 71.1 of the Federal Rules of Civil Procedure. (App. 28–49.) The United States also filed a motion to dismiss the Complaint for lack of subject matter jurisdiction. (App. 115–26.) The Landowners joined the United States' arguments about the absence of subject matter jurisdiction.[2] (App. 204.)

In the midst of the briefing on the motions to dismiss, the Parties filed a Joint Status Report and Discovery Plan. Therein, Enable acknowledged that the Kiowa Tribe's ownership of an interest in Allotment 84 would undermine the Court's subject matter jurisdiction over its condemnation claim. As part of the required Joint Status Report and Discovery Plan, Enable's Preliminary Statement of the Case stated:

[2] The Landowners' Motion to Dismiss under Rules 19 and 71.1 and the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction substantially overlapped because both arguments turned on the interpretation of 25 U.S.C. § 357—specifically whether the statute authorized condemnation of allotted land in which a federally recognized tribe holds an interest.

> Since the original easement term, there has arisen an interest in favor of the Kiowa Indian Tribe of Oklahoma which, if proven, would undermine jurisdiction of the condemnation claim based on the sovereign immunity of the Tribe, which has not been joined.

(Suppl. App. 15.)

The Joint Status Report also included the following stipulated facts to which all Parties agreed:

A. In 1980, Plaintiff's predecessor in interest was granted a 25 foot easement for a natural gas pipeline across the subject tract for a 20 year term.

B. In 2000, the voluntary easement expired by its terms, although Plaintiff's predecessor in interest continued to operate the pipeline and transmit natural gas.

C. Subsequent to the expiration of the voluntary easement in 2000, the Kiowa Tribe of Oklahoma obtained an undivided interest in the subject tract by virtue of the American Indian Probate Reform Act (AIPRA).

(Supp. App. 17.)

After considering the briefing and the Joint Status Report, the district court granted the motions to dismiss and entered judgment. (App. 248–57.) The court held that it lacked subject matter jurisdiction over Enable's condemnation claim, and also held that the Tribe was a required party to that claim under Rules 19 and 71.1, but could not be joined because it was immune from suit. The court further held that

Enable's inability to join the Tribe warranted dismissal.

Enable then filed a Motion for New Trial pursuant to Federal Rule of Civil Procedure 59. (App. 298–318.) The district court denied the motion. (App. 356–57.)

The Landowners also filed a motion to recover their attorneys' fees and costs incurred in defending against Enable's condemnation claim, as allowed by Oklahoma's statutes. (App. 261–72.) The district court granted the motion. (App. 359–62.) This appeal followed.

## SUMMARY OF THE ARGUMENT

The district court's orders dismissing this action and awarding attorneys' fees to the Landowners should be affirmed.

*First*, as Enable admits, its argument that the district court erred in holding that it lacked subject matter jurisdiction is directly contrary to this Court's prior precedent. Because this Court is bound by its prior precedent, Enable's arguments are irrelevant.

*Second*, the district court's alternative basis for dismissal under Federal Rules of Civil Procedure 19 and 71.1 was not an abuse of discretion and serves as an independent basis to affirm. The Kiowa Tribe's ownership interest in the Property makes it a required party to

this action. And joinder of the Tribe is not permitted because the Tribe's sovereign immunity bars suit against it.

*Finally*, the district court correctly used rates outside of Oklahoma to calculate Plaintiffs' attorney's fees. Enable never argued below that use of local billing rates is mandatory and thus waived this argument. Further, Oklahoma law does not bar the district court from basing a fee award on out-of-state rates in appropriate circumstances. And the circumstances here justify using rates from the areas where the Landowners' counsel regularly practice instead of Oklahoma rates.

## STANDARDS OF REVIEW

This Court reviews the district court's dismissal of Enable's condemnation claim for lack of subject matter jurisdiction *de novo*. *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004).

If the district court's alternative basis for dismissal under Rule 19 is reached, it is reviewed for abuse of discretion. *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999). However, the district court's underlying legal determinations are reviewed *de novo*. *Id.*

Enable waived its arguments for reversal of the district court's attorneys' fee award. If the Court reaches those arguments, the district

court's legal analysis is reviewed *de novo*, but the underlying factual findings are reviewed for an abuse of discretion. *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257 (10th Cir. 2005).

## ARGUMENT

The district court's orders should be affirmed in all respects.

### I. THE DISTRICT COURT'S HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION MUST BE AFFIRMED UNDER CONTROLLING TENTH CIRCUIT PRECEDENT.

In its brief, Enable argues that the district court erred when it held that because the Kiowa Tribe owns an undivided interest in the Property, it cannot be condemned pursuant to 25 U.S.C. § 357 and that the district court thus lacks subject matter jurisdiction. (Enable Br. 9–16.) But Enable correctly concedes (Enable Br. 10) that this argument is directly contrary to this Court's holding in *Public Service Company of New Mexico v. Barboan*, 857 F.3d 1101 (10th Cir. 2017).[3] Enable is correct.

In *Barboan*, this Court held § 357 does not authorize condemnation of land in which the United States holds fee title for an

[3] Public Service Company of New Mexico's Petition for Rehearing and Rehearing *En Banc* in *Barboan* was denied on July 21, 2017. (Order attached as Addendum).

Indian tribe when the tribe holds a fractional beneficial interest in the parcel. *Id.* at 1108–09. This Court then affirmed the dismissal of the condemnation action for lack of subject-matter jurisdiction on this basis. *Id.* at 1114–15.

The district court's dismissal of Enable's action is based on the exact same legal interpretation of § 357 as that found in *Barboan*. The district court held that it lacks subject-matter jurisdiction over this action because § 357 cannot apply to the Property due to the Kiowa Tribe's undivided interest in the tract. (App. 250–52.)

In its brief, Enable argues that § 357 should be interpreted as not applying when an Indian tribe owns an interest in allotted lands. (Enable Br. 11–16.) Enable's entire argument is that this Court got it wrong in *Barboan*. But this Court is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). The Court should therefore reject Enable's argument and affirm the district court's dismissal for lack of subject matter

jurisdiction.[4]

## II. THE DISTRICT COURT CORRECTLY HELD THAT THE KIOWA TRIBE OF OKLAHOMA WAS A REQUIRED PARTY TO THIS ACTION, AND THAT DISMISSAL WAS APPROPRIATE BECAUSE THE KIOWA TRIBE'S SOVEREIGN IMMUNITY PREVENTED JOINDER.

Because the district court lacked subject matter jurisdiction, no further analysis is required to affirm dismissal. However, the district court's alternative basis for dismissal under Federal Rules of Civil Procedure 19 and 71.1 was not an abuse of discretion and serves as an independent basis to affirm.

### A. The Kiowa Tribe's Undivided Ownership Interest in the Property Makes It a Required Party to This Action.

The Tribe's status as a required party to this action is dictated by Federal Rules of Civil Procedure 19(a) and 71.1. Under Rule 19(a):

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among the existing parties; or

[4] Because this Court is bound by its prior panel decisions, the Landowners will not address the reasons why *Barboan* is correct. Should the Court grant rehearing *en banc*, the Landowners will address those issues at that time.

> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Rule 71.1 further requires the plaintiff in a condemnation action to join as defendants "those persons who have . . . an interest in the property and whose names are then known," either when the action is filed or before a hearing on compensation. Fed. R. Civ. P. 71.1(c)(3).

Numerous decisions from the Tenth Circuit and district courts hold that tribes are required parties in cases affecting similar interests. *See N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (concluding Eastern Shoshone Tribe was a required party to an action regarding the imposition of vehicle and excise taxes on tribal members who resided on the reservation); *Enter. Mgmt. Consultants, Inc. v. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (holding that the sovereign interests of the Tribe may not be litigated in its absence);

*Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539–40 (10th Cir. 1987) (tribe was a required party to claims brought by lessee to enforce oil and gas lease rights on tribal land); *see also Pub. Serv. Co. of N.M. v. Approximately 15.49 Acres of Land in McKinley Cty., N.M.* (*PSNM*), 155 F. Supp. 3d 1151, 1169-73 (D.N.M. 2015) (holding that the Navajo Nation was a required party in an action to condemn an easement across two allotments under 25 U.S.C. § 357 because the Nation owned undivided fractional interests in those allotments), *aff'd on other grounds sub mon Barboan*,[5] 857 F.3 1101; *Ctr. for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1225-27 (D. Colo. 2012) (finding Navajo Nation was a required party to action challenging issuance of mining permit on land owned by the tribe).

In this case, the Kiowa Tribe's ownership interest in the Property makes it a required party. *See PSNM*, 155 F. Supp. 3d at 1169–73. The Tribe is also a required party under Rule 19(a)(1)(A) because complete

[5] In *Barboan*, this Court affirmed the district court's dismissal of the condemnation claims as to the allotments in which the Navajo Nation held an undivided interest for lack of subject matter jurisdiction. *See supra* Section I. Because it affirmed on jurisdictional grounds, the Court did not reach the district court's alternative basis for dismissing those claims under Rules 19 and 71.1.

relief cannot be afforded in the Tribe's absence—Enable cannot access the Property without an easement that is binding on *all* of the owners. Further, under Rule 19(a)(1)(B)(ii), Enable would be subject to inconsistent obligations if the individual landowners' rights were condemned but the Tribe retained the right to exclude Enable from the Property and to pursue claims for trespass. The Tribe is therefore a required party on all possible grounds under Rule 19(a).

### B. The Tribe Cannot Be Joined.

Because the Tribe is a required party, the district court was next required to determine if it is feasible to join the Tribe in this action. *N. Arapaho*, 697 F.3d at 1278–79. The district court correctly concluded that joinder of the Tribe was not feasible, and in-fact not possible, because the Tribe's sovereign immunity bars suit against it. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998) (holding that the Kiowa Tribe of Oklahoma enjoys sovereign immunity from suit).

Enable argues that the Tribe's immunity from suit did not require dismissal of its claim under Rule 19 on two grounds: because Congress allegedly waived the Tribe's immunity when it passed § 357, and because its condemnation claim was an *in rem* action that allegedly did

not implicate the Tribe's immunity. (Enable Br. 16-17). Neither argument has merit.

Enable's argument regarding the interpretation of § 357 is duplicative of its subject matter jurisdiction arguments, addressed *supra*. As this Court held in *Barboan*, § 357 did not waive the Tribe's immunity from suit. Section 357 also does not mention any waiver of tribal immunity, and "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (internal quotation marks omitted). Enable's argument thus also fails in the context of Rules 19 and 71.1.

Enable's *in rem* argument also fails. The Supreme Court has rejected the argument made here that a condemner may proceed directly against the land under § 357, explaining that the United States, as sovereign, is an indispensable party when it holds an interest in the land. *Minnesota v. United States*, 305 U.S. 382, 386–88 (1939); *see United States v. Alabama*, 313 U.S. 274, 282 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States"); *The Siren*, 74 U.S. 152, 154 (1868) ("[T]here

is no distinction between suits against the government directly, and suits against its property."); *see also Pub. Serv. Co. of N.M. v. Approximately 15.49 Acres of Land in McKinley Cty., N.M.*, 167 F. Supp. 3d 1248, 1264 (*PSNM II*) (D.N.M. 2016) ("[A] federal condemnation proceeding under § 357 is not purely an *in rem* proceeding in which there are no indispensable parties"). Moreover, Enable attempted to take the property of a separate sovereign, the Kiowa Tribe. The sovereign interests of the Tribe may not be litigated in its absence. *Enter. Mgmt. Consultants*, 883 F.2d at 894.

Enable also gestures toward *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), as supporting its *in rem* exception argument. (Enable Br. 17.) But *County of Yakima* does not aid Enable. In *County of Yakima*, the Supreme Court considered whether the county could impose an ad valorem tax on fee-patented land within the Yakima Indian Reservation, and whether it could impose an excise tax on the sale of such land. 502 U.S. at 253. Although the land at issue was within the boundaries of the reservation, it was owned in fee by the tribe, or by individual Indians and non-Indians. *Id.* at 256. The Court held that under the General

Allotment Act, 25 U.S.C. § 349, Congress explicitly provided that issuance of a fee patent "would free the land of 'all restrictions as to sale, incumberance, or taxation.'" *Id.* at 264.

*County of Yakima* has no application to this case. First, the Court in that case had no occasion to address the tribe's sovereign immunity because the tribe instituted suit in the district court, asserting claims for a declaratory judgment and injunctive relief regarding its tax liability. 502 U.S. at 256. The Court did not address the question that would be akin to this case—whether the tribe would be immune from suit if the county had initiated foreclosure proceedings to collect the tax.

Since *County of Yakima* was decided, other courts have recognized that it did not create an exception to tribal sovereign immunity from suit. In *Cayuga Indian Nation of New York v. Seneca County, New York*, 761 F.3d 218 (2d Cir. 2014), the Second Circuit rejected the county's reliance on *County of Yakima* and held that the tribe's sovereign immunity barred foreclosure proceedings against real property owned by the tribe to recover unpaid property taxes. 761 F.3d at 220–21. In so holding, the Second Circuit declined "to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—

that Seneca County has urged [the court] to adopt." *Id*. at 221 (citations omitted). The Second Circuit also made clear that there is a material distinction between "the common-law tribal immunity *from suit*—as opposed to other, largely prescriptive, powers of the states such as the levying of taxes." *Id.*; *see also Oneida Indian Nation of New York v. Madison Cty.*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property."), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d 408 (2d Cir. 2011).

Second, *County of Yakima* itself makes clear that it did not create a general *in rem* exception to tribal sovereign immunity. The Court characterized the county's jurisdiction to impose the ad valorem tax on sales of fee-patented land as *in rem* to distinguish its earlier decision in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), in which it held that the state of Montana could not impose personal property and cigarette sales taxes on Indian residents of a reservation. *Cty. of Yakima*, 502 U.S. at 261, 264–65. However, the Court's reference to the taxes being levied by the county as "*in rem*" was not an indication that all claims that had been

historically given that label were excepted from traditional notions of tribal sovereign immunity. Rather, the Court's holding was limited to the express language of 25 U.S.C. § 349. Most significantly, the Court's holding only applies to land within the scope of § 349—land for which a fee patent has been issued. The Court's narrow reading of § 349 is demonstrated by the fact that it held that the county could *not* impose an excise tax on the sale of fee-patented reservation land, because Congress only authorized taxation of the land itself, not the proceeds from its sale. *Cty. of Yakima*, 502 U.S. at 268.

As this Court held in *Barboan*, there is no statute that contains a comparable authorization for Enable to condemn the Kiowa Tribe's interest in Allotment 84, which is held in trust (App. 52), not by fee-patent. In sum, *County of Yakima* provides no basis for reversing the district court's analysis under Rules 19 and 71.1.

### C. Rule 19(b) Required Dismissal.

Because the Tribe is a required party but cannot be joined, the district court correctly dismissed Enable's action under Rule 19(b). That rule provides that "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good

conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). In making this determination, courts consider:

1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

2) the extent to which any prejudice could be lessened or avoided by:

   (A) protective provisions in the judgment;

   (B) shaping the relief; or

   (C) other measures;

3) whether a judgment rendered in the person's absence would be adequate; and

4) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder.

*Id.*

This Court has held that when, as here, "a necessary party under Rule 19(a) is immune from suit, there is very little room for balancing of other factors . . . because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt. Consultants*, 883

F.2d at 894 (internal quotation marks and citation omitted).[6] Accordingly, this Court has consistently affirmed dismissal under Rule 19 when a tribe is a required party and cannot be joined because of immunity. *See N. Arapaho*, 697 F.3d at 1281–84 (affirming dismissal of suit because the Eastern Shoshone Tribe was a required party and was immune from suit); *Jicarilla*, 821 F.2d at 539–40 (affirming dismissal "because the Tribe was an essential party to the litigation but was immune from suit"); *Enter. Mgmt. Consultants*, 883 F.2d at 894 (affirming dismissal of contractor's claims for review of management contracts because the Citizen Band Potawatomi of Oklahoma was a required party and could not be joined because of its sovereign immunity); *see also PSNM*, 155 F. Supp. 3d at 1169–73 (dismissing condemnation claims because the Navajo Nation owned interests in the property and was immune from suit); *Ctr. for Biological Diversity*, 858 F. Supp. 2d at 1228–30 (dismissing action because the Navajo Nation

[6] Since *Enterprise Management Consultants* was decided, the terminology of Rule 19 has been changed to refer to "required parties" rather than "necessary parties." These terms are still sometimes used interchangeably by the courts and this terminology change does not alter the analysis under Rule 19.

was a required party and was immune from suit). This case is no different. The district court thus did not abuse its discretion.

## III. THE DISTRICT COURT CORRECTLY AWARDED ATTORNEYS' FEES TO THE LANDOWNERS.

Enable also appeals the district court's award of attorneys' fees to the Landowners.[7] Enable does not dispute that the Landowners are entitled to attorneys' fees if the dismissal of the condemnation claim is affirmed. Enable solely contests the amount of the attorneys' fee award. Enable argues that under *State of Oklahoma ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979), the district court was *required* to base the attorneys' fee award on Oklahoma billing rates, and that the district court erred by applying an exception recognized by *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006), when a matter requires specialized expertise and a party is not able to find qualified local counsel to represent them. (Enable Br. 18-21.)

This argument is misplaced for three reasons. *First*, Enable never argued below that use of local billing rates is mandatory under *Burk*. To the contrary, Enable expressly agreed that the exception recognized by

[7] Enable does not contest the costs awarded to the Landowners; it only challenges the amount of the attorneys' fees awarded by the district court.

*Lippoldt* could be applied if the district court found that the Landowners were not able to find counsel in Oklahoma with the requisite expertise. Enable cannot argue on appeal that the district court erred by applying the *Lippoldt* exception when calculating the fee award.

*Second*, Oklahoma's Supreme Court has recognized that the factors set-forth in *Burk* are not absolute. While *Burk* encourages use of local billing rates, Oklahoma law does not bar the district court from basing a fee award on out-of-state rates in appropriate circumstances. And *third*, based on this case's circumstances, the district court properly used rates from the areas where the Landowners' counsel regularly practice instead of Oklahoma rates.

### A. Enable Cannot Challenge the District Court's Reliance on *Lippoldt* Because Enable Acknowledged Below that *Lippoldt* Could Apply.

Enable is not permitted to challenge the district court's reliance on *Lippoldt* when calculating the fee award because Enable acknowledged that *Lippoldt* could apply.

As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120

(1976). There are two rules that bar appellate review of issues not raised in the district court: waiver and forfeiture.

> Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment of a known right. In other words, waiver is accomplished by intent, [but] forfeiture comes about through neglect. Given this distinction, we have held that a party that has *forfeited* a right by failing to make a proper objection may obtain relief for plain error; but a party that has *waived* a right is not entitled to appellate relief. . . . In short, plain-error review is available for forfeited issues, but wavier bars a defendant from appealing an invited error.

*United States v. Griffin*, 294 F. App'x 393, 395 (10th Cir. 2008) (citation and internal quotation marks omitted) (alteration in original); *see also United States v. Burson*, 952 F.2d 1196, 1203 (10th Cir. 1991) (explaining that the invited-error doctrine "prevents a party who induces an erroneous ruling from being able to have it set aside on appeal").

This Court previously addressed the distinctions between waiver and forfeiture of arguments by an appellant. *See United States v. Rodebaugh*, 798 F.3d 1281, 1293–94 (10th Cir. 2015) (refusing to consider argument that was not raised below when no plain error argument was made on appeal); *Richison*, 634 F.3d at 1131 ("[T]he failure to argue for plain error and its application on appeal . . . surely

marks the end of the road for an argument for reversal that was not presented to the district court.").

In the district court, Enable cited *Burk*, but acknowledged that rates from other areas where the Landowners' attorneys practice may be used to calculate the fee award when "the litigation is 'so unusual or requires such special skills' that only an out-of-state attorney possesses . . . ." (App. 325 (quoting *Lippoldt*, 468 F.3d at 1225 (internal quotation marks omitted)).)

The full paragraph from Enable's brief to the district court is as follows:

> Most notably, in *Burk* the Court held the "reasonable value of services should be predicated on the standards within the *local* legal community." *Id.* at 663 (emphasis added). This concept is a well-accepted legal standard. "Unless the subject of the litigation is 'so unusual or requires such special skills' that only an out-of-state attorney possesses, the 'fee rates of the local area should be applied even when the lawyers seeking fees are from another area." *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006) (internal citations omitted); *see also e.g.*, *Little Rock School Dist. v. Arkansas*, 674 F.3d 990, 997 (8th Cir. 2012) (rates limited to "similar work in the community"); *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995).

(App. 325.)

Enable argued that the exception for out-of-state rates recognized in *Lippoldt*, while available, should not be applied based on the facts of this case. Enable argued that "Oklahoma practitioners who deal with real property, eminent domain, probate, personal injury, and oil and gas law must necessarily be familiar with Indian law . . . . [I]t would be incorrect to suggest that there were not competent Oklahoma attorneys to litigate the claims in this case. Therefore, reasonableness of attorneys' fees should be predicated on local rates." (App. 327.)

This was not an inadvertent failure by Enable to address *Lippoldt*'s application. It was "an explicit and deliberate disavowal" of the argument Enable makes on appeal—that *Burk* absolutely precludes use of out-of-state billing rates when making an attorney fee award under Oklahoma law. *Griffin*, 294 F. App'x at 396; *see also Feres v. Xyngular*, 647 F. App'x 861 (10th Cir. 2016) (unpublished) (concluding that the invited error doctrine barred defendant's arguments on appeal regarding inclusion of attorneys' fees in damages award when defendant acknowledged in the trial court that fees could be considered consequential damages by the jury). The district court rejected Enable's argument under *Lippoldt* on the facts, and, as discussed below, did not

abuse its discretion in doing so. However, the district court followed the legal framework Enable presented, including the application of *Lippoldt*. (App. 361–62.)

Enable's reliance on *Little Rock* and *Hadix* in the district court further precludes Enable's argument on appeal. These cases were not cited by the Landowners. *Little Rock* holds that "rates are not limited to those prevailing in a local community where those rates would not be 'sufficient to attract experienced counsel' in a specialized legal field. In such a case, '[a] national market or a market for a particular legal specialization may provide the appropriate market.'" 674 F.3d at 997 (quoting *Casey v. City of Cabool*, 12 F.3d 799, 805 (8th Cir. 1993)). *Hadix* similarly recognizes that the use of out-of-state billing rates is appropriate when specialized expertise is needed and cannot be found locally. 65 F.3d at 534-35.

Having acknowledged that the trial court could rely on these authorities, and particularly on *Lippoldt*, Enable cannot contend on appeal that doing so was error.

### B. *Burk* Does Not Preclude Use of Out-of-State Rates Under the Circumstances of This Case.

Even if Enable had made its present argument in the district court, *Burk* does not preclude the district court from using out-of-state rates to calculate an attorneys' fee award.

Enable mischaracterizes *Burk* when it states that under *Burk* "an attorney fees award under Oklahoma law *must* be 'predicated on the standards within the local legal community.'" (Enable Br. 21 (quoting *Burk*, without specific citation to the opinion) (emphasis added)). *Burk* actually states that:

> Hereafter, attorneys in this state *should* be required to present to the trial court detailed time records showing the work performed and offer evidence as to the reasonable value for the services performed for different types of legal work. Reasonable value of services *should* be predicated on the standards within the local legal community. This will enable trial courts to remove the fixing of attorney fees, not only in this type of action, but in every case, from the realm of speculation and guesswork into the area of simple mathematical computation. The trial court may then, with certainty, determine the compensatory fees.

*Burk*, 598 P.2d at 663 (emphasis added). Thus, while *Burk* expresses a preference for using local rates, it does not dictate that local rates "must" be used.

Since *Burk* was decided, Oklahoma's Supreme Court has made clear that it provides "guidelines"—not absolute requirements—for fee awards. In *Conti v. Republic Underwriters Insurance Company*, 782 P.2d 1357 (Okla. 1989), Oklahoma's Supreme Court held that an attorneys' fee application was not barred by the attorneys' failure to submit detailed time records, as recommended by *Burk*.

The appellant in *Conti* made substantially the same argument Enable advances in this case:

> The appellant's argument is based on the perception that the guidelines set out in *State ex rel., Burk v. City of Oklahoma City*, Okl., 598 P.2d 659 (1979) are mandatory, and that failure of counsel to follow those documentation guidelines prohibits an award of attorney fees.

*Conti*, 782 P.2d at 1362. The court rejected this argument, holding that so long as the trial court had "an adequate record upon which to judge the reasonableness of an attorney fee award," that award would not be reversed for abuse of discretion. *Id.* The courts that have since examined the issue have held that it is "clear that the [*Burk*] guidelines were not mandatory." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Whitney*, No. 09-CV-78-GKF-FHM, 2010 WL 2079668, at *3 (N.D. Okla. May 20, 2010).

### C. The District Court Did Not Abuse Its Discretion When It Found that the Circumstances of This Case Justified Using Out-of-State Billing Rates for the Landowners' Attorneys.

Finally, in two sentences, Enable argues that the Landowners failed to satisfy the *Lippoldt* standard. (Enable Br. 21.) This aspect of the district court's decision is reviewed for abuse of discretion. *Praseuth*, 406 F.3d at 1257.

Enable makes no showing how the district court abused its discretion by finding that the *Lippoldt* standard was met. To the contrary, the record shows that the Landowners were required to seek counsel outside of Oklahoma to represent them due to this case's factual and legal complexity. (*See* App. 276–85, 346–48.) Even OILS, which regularly represents indigent Indian clients, was unable to handle this case by itself due to the sheer number of Landowners (38), and the complexity of the legal issues, which involved the intersection of federal statutes, state law, federal common law, and the involvement of the BIA. (App. 346–48.) Because the district court had before it "an adequate record upon which to judge the reasonableness of an attorney fee award," its award of attorneys' fees should be affirmed. *Conti*, 782 P.2d at 1362.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal of Enable's condemnation action and its award of attorneys' fees to the Landowners.

## REQUEST FOR ORAL ARGUMENT

The Landowners request oral argument because this case involves substantial issues that affect their fundamental property rights. Oral argument will assist the Court in reviewing and deciding these issues.

Respectfully submitted,

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DATE: April 16, 2018

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the applicable type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), the foregoing brief contains 6,407 words, as measured by the word count feature of Microsoft Word 2016.

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, Version 1.265.737.0, last updated 04/16/2018 at 3:01 PM and according to the program are free of viruses.

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## CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, I electronically transmitted the foregoing Brief of Appellees to the Clerk of Court using the ECF system and served the Brief of Appellees by first class mail on the following ECF registrants:

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# ADDENDUM

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**July 21, 2017**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation,

Plaintiff - Appellant,

v.

LORRAINE BARBOAN, a/k/a, Larene H. Barboan, et al.,

Defendants - Appellees,

and

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

Defendants.

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GPA MIDSTREAM ASSOCIATION, et al.,

Amici Curiae.

No. 16-2050

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**ORDER**

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Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk